

(24,601)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 857.

THE JAMES CLARK DISTILLING COMPANY, APPELLANT,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY AND
THE STATE OF WEST VIRGINIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MARYLAND.

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1 UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND, *To-wit:*

At a District Court of the United States in and for the District of Maryland, Begun and Held at the City of Cumberland on the Last Monday in September, (Being the Twenty-eighth Day of the Same Month), in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

Present: The Honorable John C. Rose, Judge Maryland District; John Philip Hill, Esq., attorney; George W. Padgett, Esq., Marshal; Arthur L. Spamer, clerk; William J. Feaga, deputy clerk.

Among other were the following proceedings, to wit:

In Equity.

THE JAMES CLARK DISTILLING COMPANY OF CUMBERLAND, MARYLAND, a Corporation,
vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

2 *Bill of Complaint.*

Filed August 24, 1914.

In the District Court of the United States in and for the District of the State of Maryland. In Equity.

No. 2, Equity Docket. At Cumberland, Maryland.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,
Complainant,
vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation,
Defendant.

To the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland, sitting at Cumberland, Maryland:

The Bill of Complaint of The James Clark Distilling Company, of Cumberland, Maryland, a corporation, and citizen of the State of Maryland, against the Western Maryland Railway Company, also a corporation, and citizen of Maryland, respectfully shows and complains to your honor, as follows:

1. That your orator is a corporation legally incorporated, organized and existing under the laws of the State of Maryland, and as such is a citizen of and an inhabitant of said State, residing therein,

and doing business in the City of Cumberland, in said State, and as such corporation, it is now and for a long time past has been engaged in the business of manufacturing, selling and dealing in spirituous and fermented liquors, and for many years last
3 past has been doing a large and profitable business by the sale of such liquors and merchandise to persons residing in the States of West Virginia, Ohio, Pennsylvania and elsewhere.

2. That the defendant, The Western Maryland Railway Company, is a railroad corporation, legally incorporated, organized and existing under the laws of the State of Maryland, and is a citizen and resident of said State, and for several years last past has been, and is now the owner of a railroad beginning in the City of Baltimore, Maryland, and running thence westerly through the States of Maryland, Pennsylvania and West Virginia, and into and through the City of Cumberland, in Maryland, and from thence into and through the Counties of Mineral, Grant and Tucker, in said State of West Virginia, and for some years past has been, and is still now operating said railroad as a common carrier through said State, and is therefore a railroad company engaged as such common carrier, in interstate transportation of passengers and goods, wares and merchandise, between and through said States, and as such common carrier between the States of Maryland and West Virginia, is engaged in interstate commerce, and as such is one of the railroad companies subject to the Act of Congress to regulate commerce under the Interstate Commerce clause of the Constitution of the United States, approved February 4, 1887, and all the amendments thereto passed by Acts of Congress since said date, and especially the Act of Congress approved June 18, 1910, commonly called the Act to regulate commerce.

3. Your orator further charges that said railroad line is equipped by said Company with all necessary cars and other vehicles and instrumentalities and facilities, for shipment or carriage of goods, wares and merchandise, and the handling of such property transported by it from Cumberland through said Counties of

4 Mineral, Grant and Tucker, in West Virginia, and runs and operates from Cumberland, Maryland, through said Counties of West Virginia, daily trains, so equipped for such transportation, and has and maintains stations and platforms at various points in said Mineral, Grant and Tucker Counties, West Virginia, at and from which to deliver freight and merchandise so transported from Cumberland to said places, and has such a station for such delivery of such merchandise so transported, in the town of Parsons, in Tucker County, West Virginia, in constant charge of regular agents, and has at the City of Cumberland freight stations in charge of competent employees and agents for the receipt and acceptance of all lawful freight tendered said Company for transportation to all said points in the State of West Virginia, and that by reason of all of the foregoing, it is the legal duty of said Railroad Company, as such common carrier in interstate business, to accept for transportation over its said lines, all lawful goods, wares and merchandise delivered to its freight station at Cumberland for trans-

portation on its railroad from Cumberland through said States of Maryland and West Virginia to said points of delivery in the said counties of West Virginia, and that by said Act of Congress, commonly called the Act to regulate commerce, and by said amendments thereof, it was made the duty of said defendant company to provide and furnish such transportation for such goods and wares so tendered to it for transportation upon reasonable request therefor.

4. Your orator further says that by the aforesaid Act of Congress, and the amendments thereof, it was made unlawful for any common carrier subject to the provisions of the same, to make or give any undue or unreasonable preference or advantage to any particular person, or to any particular description of traffic in any

5 respect whatsoever, or to subject any particular person, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever, and that for the reasons aforesaid, all the provisions of said Act are applicable to and binding upon said defendant railroad company, in respect to all transportation of goods, wares and merchandise from Cumberland, in Maryland, to said Counties in West Virginia.

5. Your orator further charges that in the due and regular course of its business, it did on the morning of the 20th day of August, 1914, receive at Cumberland, Maryland, by mail a written order from one Floyd Rosier, a citizen and resident of the town of Parsons, in Tucker County, West Virginia, to ship to him at Parsons, West Virginia by the first train from Cumberland, Maryland, four quarts of alcohol, of 1.88 proof, by express, which order to ship said liquor was accompanied by a money order for \$4.00 to pay your orator for the same, and your orator now says that said order was a bona fide order in every respect, and sent to your orator without any solicitation on the part of any person, inducing said Rosier to send the same, and that said order stated on its face that it was for the personal use of said Rosier, and your orator now charges that it has every reason to believe and does believe that said order came to it in a perfectly lawful manner, and that said liquor was intended for the personal use of the said Rosier, and that your orator has no reason whatever of any kind to suspect that said order for said liquor was given or intended, to in any way violate the laws of the State of West Virginia.

6. Your orator further charges that on said 20th day of August, 1914, it thereupon prepared said one gallon of alcohol, of the proof named in said order for shipment to said Rosier, and presented the same for transportation to the American Express Company,

6 which is the only express company shipping goods from Cumberland to Parsons by the aforesaid railroad of the defendant, but that the agents and officials of said express company refused to accept or transport the same, and that thereupon your orator delivered said shipment of alcohol to the proper employes, agents and officials of the defendant at its freight house at Cumberland, Maryland, for shipment over its said railway line by freight to the said Rosier, at Parsons, West Virginia, and tendered to pay or satisfy the freight charges for the delivery of said shipment, at

said town of Parsons, to said Rosier, and made demand on W. A. Yingling, Freight Agent of the defendant company at Cumberland, Maryland, at said freight house, to accept the same for such shipment to Parsons, but that said Yingling and all the agents and servants of the defendant company refused to accept the same, or to ship the same over said railway line of the defendant to said town of Parsons, giving as a reason therefor that said Railway Company had been enjoined by an order of the Circuit Court of Tucker County, State of West Virginia, from receiving, transporting or delivering any fermented or intoxicating liquors, at or in said three Counties of said State, except on conditions set out in said injunction so burdensome to said business and traffic and interstate transportation of said liquors, as made it impossible for said railway company to comply with the same, said agent and other employes giving no other reason for their refusal to accept and ship said merchandise, whereupon your orator took said alcohol to the Superintendent's office of said railway company, and again tendered the same for shipment to its customer at Parsons, West Virginia, but the officers in charge thereof also refused to accept the same for such transportation, and your orator now charges

7 that said defendant company absolutely refused to accept said shipment of alcohol from Cumberland to Parsons to said Rosier and refused to transport the same, and still does so refuse, whereby your orator has been unable to make said sale to said Rosier of said alcohol, and has been, and still is unable to ship the same to him and has lost the profit upon said sale and has been thus prevented from doing said business in interstate commerce, which it was entitled to do, and your orator now files herewith as part of this bill of complaint said original written order of said Floyd Rosier, and the money order he sent to pay for said liquor accompanying the same, and the triplicate bill of lading made out by your orator for the signature of the agent of the defendant, in the usual course of such business, for the shipment of the said goods, and which said agent refused to sign, all in one exhibit marked "Complainant's Exhibit No. 1."

7. Your orator further shows that by an Act of the Legislature of West Virginia, passed February 11, 1913, effective on the 1st day of July, 1914, the manufacture and sale or keeping for sale in the State of West Virginia of malt, vinous or spirituous liquors, wine, porter, ale, beer, or any intoxicating drink, mixture or preparation of like nature, (except certain articles not pertinent to the issue in this case), were prohibited, and by said Act it was provided that the words, liquors used therein should be construed to embrace all spirituous liquors or any other intoxicating drink, mixture or preparation of like nature, and all malt or brewed drinks, whether intoxicating or not, and all liquids, mixtures or preparations, whether patented or not, which will produce intoxication, and all beverages containing so much as one-half of one per cent of alcohol by volume, and your orator now admits that said four quarts of alcohol ordered by said Rosier was one of the kind of liquors mentioned

8 and covered by said Act of the Legislature of West Virginia, but your orator now charges that said Act did not prohibit

the sale by non-residents of the State of West Virginia to persons residing in West Virginia, of any of said liquors, where said liquors were purchased upon orders not solicited by the seller, and were desired for the consignee's own personal use, and that therefore the order of said Rosier was a perfectly lawful order for the reasons aforesaid under the laws of West Virginia, and that the transportation of such goods so purchased over said interstate line of railway, was in no wise prohibited by said law, and your orator is now advised that the injunction granted by the Circuit Court of Tucker County aforesaid and served upon the defendant company, was no legal or valid excuse for its refusal to accept and ship in interstate transportation said alcohol so offered to it for shipment, unless it be true that the requirements and restrictions set out in said injunction upon said railway company were in fact so burdensome to the said interstate business of said company, that it could not comply with the same, which your orator does not admit, but claims that said reasons given by the defendant for not making said shipment for your orator, present no valid grounds for the aforesaid denial of your orator's rights in the premises.

8. Your orator further charges that it owns and has on hand for sale and disposition within the State of Maryland a large and valuable quantity of various liquors of all kinds covered by the description in said Act of the Legislature of West Virginia, and that prior to the service of said injunction upon said defendant, your orator was doing a lucrative business in shipping such liquors to persons residing in West Virginia, upon their own personal, unsolicited

orders, for their own personal use, all of which sales and shipments your orator is advised were in no wise contrary to the laws of West Virginia or any Federal law; but that in the manner aforesaid your orator has been prevented, and is still prevented from making any more of said shipments over the railroad of the defendant to points in said three Counties in West Virginia, and that a large part of its aforesaid business since the 1st day of July, 1914, was lawfully done upon orders from said three counties, but that it is now informed by said defendant and said express company that neither of them, under the mandate and restrictions of said injunction, will hereafter accept any of said liquors for transportation to your orator's said customers, in said three Counties of West Virginia, upon their said orders, and that there is no other line of railroad or other practicable means of transportation by which your orator can serve its said customers in and through said three Counties of West Virginia, except by said interstate line of railway of the defendant, and that your orator has therefore no other means of serving its said customers except by interstate transportation over said railway, by reason of all of which your orator, unless the defendant is restrained by the order and injunction of this honorable court, will be wholly deprived of any and all such legitimate business which it otherwise could do with its said customers, in said three counties in West Virginia, upon their orders as aforesaid, and its said business, to this extent, will be wholly destroyed, and your orator will thereby

lose a very large and profitable business, and a large amount of profits much exceeding in value the sum of \$3,000.00, and that the matters in dispute as aforesaid, exceed, exclusive of interest and costs, the sum or value of three thousand dollars.

10 9. Your orator therefore charges that the defendant has violated, and is continuing from day to day to violate its duty as such interstate carrier, to provide and furnish transportation upon the reasonable requests of your orator, of its said lawful goods, wares and merchandise, which it desires to ship to its customers in said three counties of West Virginia, and is therefore acting in defiance of its duty as set out in Section 1 of said Act of Congress, commonly known as the Act to regulate commerce, and the amendments thereof, and that the defendant has already violated, and is continuing from day to day to violate the provisions of Section 3 of said Act, by subjecting your orator and its aforesaid business and traffic in said liquors, to an undue and unreasonable prejudice and disadvantage, and by its said conduct has destroyed the aforesaid lawful interstate traffic and business of your orator, with its said customers in said three counties of the State of West Virginia, and is therefore obnoxious to the condemnation of the provisions of said Section 3 of said Act, and by reason of the same your orator is entitled to all the rights and remedies by a complaint or suit in this Court against the defendant, for the prevention and redress of said wrong, provided or allowed by and under any and all laws of the United States.

10. Your orator further charges that if the defendant persists in its determination to refuse to accept for shipment said traffic of your orator, its violation of said Act of Congress and of its duty thereunder, will be of daily occurrence, for each of which violations your orator under said Act would be entitled to an action at law, in each of which actions it could recover a small amount of damages, but that such suits at law would afford your orator no full, complete and adequate remedy against the defendant on account of the

11 vast multiplicity of suits, which would be necessary on its part to obtain reparation for each and every one of said particular causes of damage, and that suits at law would not only furnish your orator no adequate remedies at law, but that unless it is speedily adjudged by a Court of competent jurisdiction, in matters of interstate commerce, that your orator has the right to make such shipments of goods, and that said defendant shall be compelled, by the mandate of this Court, to accept and transport the same, your orator's customers in the State of West Virginia will entirely cease to send in any such orders, and your orator will thereby lose all its aforesaid business permanently, and its loss will thus be irreparable, and your orator is therefore advised that its only complete and adequate remedy under the law and facts in this case, is by application to this Honorable Court for the passage of a decree in the nature of a mandatory order or injunction against the defendant, commanding and requiring it to cease refusing to accept and transport over its said railway line from Cumberland to points in said three counties of West Virginia, your orator's merchandise as aforesaid, and

commanding and requiring said defendant, to accept the same for transportation, and to transport the same in interstate commerce, from Cumberland, Maryland, and to deliver the same by means of its said railway to such points in said three counties of West Virginia, to which said goods shall be consigned by your orator, where the defendant maintains a permanent station with a regular agent for receiving and delivering goods and keeping a record of the same as required by the law of the State of West Virginia.

11. To the end therefore, that the defendant, The Western Maryland Railway Company, may answer the premises, and that a

decree of this Honorable Court may be passed, strictly commanding and enjoining the defendant, its servants, agents, employees and officers, and each of them, to cease refusing to accept for transportation, over its railway line in due course of business, from Cumberland to points of delivery in the Counties of Mineral, Grant and Tucker, State of West Virginia, all such aforesaid Liquors, ordered by the said Floyd Rosier or other customers of your orator, for their own personal use, and without solicitation on the part of your orator, and enjoining and commanding the defendant, its servants, agents, employees and officers, to accept from your orator all such merchandise as aforesaid, presented to it for shipment over its line to said points in West Virginia, and enjoining and commanding the defendant, its servants, agents, employees and officers, to transport the same in interstate commerce, from Cumberland, in the State of Maryland, to all such points on its railway line in the said three counties of West Virginia, where the defendant maintains a permanent station with a regular agent for receiving and delivering such goods, and for the keeping of a record of the same as required by the law of West Virginia, and perpetually requiring and commanding the defendant to deliver all such liquors, presented for shipment by your orator, over its line at said points in said three counties of West Virginia, to the consignees thereof upon such aforesaid orders of your orator's customers, and that your orator may have such other and further relief as its case may require.

May it please your Honor to pass an order hereon, to be served by the United States Marshal of the State of Maryland, upon the defendant herein, commanding and requiring it to be and appear in this Court at Cumberland, Maryland, on some certain day to be fixed by the order of this Court, to thereupon answer the premises and show cause, if any it has, why such decree should not be passed as prayed.

And as in duty bound, etc.

WALTER C. CAPPER,
J. PHILIP ROMAN,
Solicitors for Complainant.

STATE OF MARYLAND,
Allegany County, To-wit:

I hereby certify that on this 21st day of August, 1914, before me the subscriber, a Notary Public, in and for the State and County

aforesaid, personally appeared John Keating, Vice-President and Treasurer of the James Clark Distilling Company, of Cumberland, Maryland, the complainant in the above case, and made oath in due form of law that he is such Vice-President and Treasurer of said Company and familiar with its business and affairs, and is fully acquainted with the matters and things set out in the foregoing bill of complaint, and that the matters and things therein stated and set forth are true to the best of his information, knowledge and belief.

Witness my hand and Notarial Seal.

[NOTARY'S SEAL.]

GROVER J. DONAHOE,
Notary Public.

My Commission Expires May 1, 1916.

14

PARSONS, W. VA., Aug. 19, 1914.

The James Clark Distilling Co., Cumberland, Md.

DEAR SIR: Please ship me to Parsons, W. Va., By Express 4 quarts of Alcohol 1.88 proof. Please find enclosed money order for \$4.00. Please ship at once.

Yours Resp.

FLOYD ROSIER,
Parsons, W. Va.

By Return Train.
For Personal use.

(Mem. of Clerk: Address, etc., on Envelope.)

Return in 5 days
To Floyd Rosier,
Parsons, W. Va.

Belington,
Aug. 19
11 A. M.
1914.
W. Va.

Cancelled 2¢
Postage
Stamp

THE JAMES CLARK DISTILLING Co.,
Cumberland,
Md.

553 Lock Box.

CHARTS

TOO

LARGE

FOR

FILMING

PLAINTIFF'S EXHIBIT NO. 1.

Filed August 24, 1914.

86242 BELINGTON, W. VA. 30457
(Office Number) (Serial Number)

Aug. 19, 1914.

Postal Money Order.

Paying Office
Stamp Here

Dollars Cents
4 #
(Amount for which issued)

Not Good for More Than
Largest Amount Indicated
on Left Hand Margin.

The Postmaster At Cumberland, Md., Will Pay
Amount Stated Above To Order of Payee Named in
Attached Coupon of Same Number.

B. B. ROHRBAUGH,
Postmaster.

Received Payment:

Paying Postmaster Should Send This Order To
Auditor With M. O. Statement.

Any alteration or Erasure Renders this Order Void.
Coupon should Be Detached Here By Paying Postmaster.

86242 30457
(Office Number) (Serial Number)

Coupon.

Issuing Office
Stamp Here

Four Dollars # Cents

Payee:
JAMES CLARK DISTILLING CO.

Remitter:
FLOYD ROSIER.

This Coupon should be retained at Paying Office.

Coupon stamped in red ink: Belington, W. Va.
Aug. 19, 1914. M. O. B.

(Here follows bill of lading marked p. 16.)

* * * * *

17-19 *Answer of the Western Maryland Railway Company.*

Filed September 14, 1914.

In the District Court of the United States in and for the District
of the State of Maryland.

In Equity.

No. 2, Equity Docket. At Cumberland, Md.

THE JAMES CLARK DISTILLING COMPANY, a Corporation, Com-
plainant,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation, De-
fendant.

To the Honorable John C. Rose, Judge of the District Court of the
United States for the District of Maryland, Sitting at Cumber-
land, Md.:

The answer of the Western Maryland Railway Company to the
bill of complaint of the James Clark Distilling Company, of Cum-
berland, Maryland, in this case filed against it, respectfully shows to
your Honor:

1. This respondent admits all the allegations of paragraphs one,
two and three of the bill of complaint.

2. And as to paragraph four of said bill of complaint, this re-
spondent admits generally that the matters and things therein stated
are true, so far as they relate to interstate transportation of all ordi-
nary goods, wares and merchandise, but cannot admit that the alle-
gations in said paragraph are true in all cases, or that the Act of

20 Congress commonly called the Act to regulate commerce, and
the amendments thereof, require this respondent to accept
and make shipments of interstate traffic from the State of
Maryland to delivery points in the State of West Virginia of all
kinds of merchandise whatsoever, but on the contrary charges that
in regard to such shipments of intoxicating liquors this respondent,
in the matter of certain shipments thereof under certain circum-
stances is prohibited from accepting intoxicating liquors for inter-
state transportation between said points, and from transporting the
same or delivering the same at points in West Virginia, by certain
laws of the State of West Virginia, and an Act of Congress com-
monly called the Webb-Kenyon Act, as will be more particularly
hereinafter set out and explained.

3. And as to paragraph five of the bill of complaint, this re-
spondent admits the allegations of said paragraph five, so far as it
has knowledge of all the matters therein stated, but cannot admit as
true the statement therein that the order from Floyd Rosier, therein
referred to, was a bona fide order in every respect, or that it was

sent to the plaintiff without any solicitation on the part of any person inducing said Rosier to send the same. This respondent has no knowledge as to the truth of these particular statements with regard to said order, and therefore cannot admit the same, but leaves plaintiff to its proof of the same. But respondent is willing to admit that when said order from said Rosier was presented by the plaintiff along with the shipment of liquor therein mentioned to respondent's agent at Cumberland, requesting the acceptance and shipment of said liquor to Parsons, West Virginia, there was nothing on the face of said order or in the kind or character of said shipment of liquor which justified in any way a suspicion on the

21 part of this respondent's agents that said -ment was being made by the plaintiff for the purpose of violating any of the aforesaid laws, State or Federal, but had every appearance of being a regular and legally authorized shipment of liquor under said laws.

4. Respondent further answering says that it admits that on the 20th day of August, 1914, plaintiff presented one gallon of alcohol for shipment to said Rosier, at Parsons, to the Agents of respondent at Cumberland, as charged in the bill of complaint, and that this respondent's agents refused to accept the same, or to transport the same in interstate commerce over its railway line to said town of Parsons, in West Virginia, and that respondent's agents gave to the agents of the plaintiff, respondent's reasons for refusing to receive, transport or deliver said alcohol as set out in said sixth paragraph, and gave the plaintiff's agents no other reason for such refusal, all as charged in said paragraph, and is willing to admit that by reason of respondent's refusal to so receive and transport said alcohol, the plaintiff has been unable to make sale of the same to said Rosier as charged, and has been, and is still, unable to ship the same to him, as charged, and that plaintiff has lost the profit on said sale, and has been to that extent prevented from doing business in interstate commerce as charged, and that its agents did refuse to sign the triplicate bills of lading made out by the plaintiff, covering said proposed shipment of said alcohol, and that the exhibit filed by plaintiff does contain said original order of said Floyd Rosier, and the money order he sent with the same to pay for said liquor, and the triplicate bills of lading made out by plaintiff, and which respondent's agents refused to sign.

22 5. And as to the seventh paragraph of the bill of complaint, this respondent admits that by an act of the Legislature of West Virginia, passed February 11, 1913, effective on the first day of July, 1914, the manufacture and sale, or keeping for sale, in the State of West Virginia, of malt, vinous or spirit-ous liquors, wine, porter, ale, beer, or any intoxicating drink, mixture or preparation of like nature, (except certain articles not pertinent to the issues in this case), were prohibited, and further admits that by said Act, it was provided that the word liquors used therein should be construed to embrace all spirit-ous liquors or any other intoxicating drink, mixture or preparation of like nature, and all malt or brewed drinks, whether intoxicating or not, and all liquids,

mixtures or preparations, whether patented or not, which will produce intoxication, and all beverages containing so much as one-half of one per cent of alcohol by volume, and further admits that said four quarts of alcohol ordered by said Rosier was one of the kinds of liquors mentioned and covered by said Act of the Legislature of West Virginia, and further admits that said Act did not prohibit the sale by non-residents of the State of West Virginia to persons residing in West Virginia of any of said liquors, where said liquors were purchased under orders, not solicited by the seller, and were desired or intended for the consignee's own personal use, and further admits that if it shall be made to appear to this Court that the order of said Rosier was given to plaintiff without solicitation, and was intended for said Rosier's own personal use, that said order was a lawful one under the laws of West Virginia, and therefore lawful under the aforesaid Act of Congress called the Webb-Kenyon law, and was not prohibited by said laws, but this respondent cannot admit

- 23 that said injunction granted by the Circuit Court of Tucker County, West Virginia, set out in the bill of complaint, and served on this respondent, was not a legal or valid excuse on the part of this respondent for its refusal to accept and ship in interstate transportation said alcohol so offered to it for shipment by the plaintiff, but on the contrary respondent charges that said injunction was a legal and valid excuse for its refusal to so accept and ship said alcohol, because said injunction of said Court contained certain requirements of things to be done by this respondent before it could accept and transport any of said liquors whatever under any circumstances into the State of West Virginia, until said requirements were complied with, and respondent now says that the requirements set out in said injunction were of such a character that it was impossible for this respondent to perform or comply with the same, for the reasons which will be more fully hereinafter set out, and that respondent being thus unable to comply with said requirements, it was advised that said injunction practically prohibited this respondent from accepting for shipment or shipping in interstate commerce from points outside the State of West Virginia to points within the State of West Virginia, of any and all liquors whatever, and respondent was further advised that until said injunction was either dissolved or modified it was bound to obey the same within the jurisdiction of the Court granting the same, which jurisdiction covered said Mineral, Grant and Tucker Counties of West Virginia, in the latter County of which the said town of Parsons is located, and respondent now says that it refused said shipment of liquor of the plaintiff for the sole reason that it was advised that the same was effective and binding upon it, unless it performed said impossible conditions, and admits that it did not
- 24 refuse said shipment of alcohol for any other reason whatever, and now pleads, avers and sets up the pendency of said injunction against it in regard to said liquors, as a lawful and valid excuse for its refusal to ship said liquors, and as a legal, equitable and sufficient answer to all the matters set out in said bill of complaint so filed against it.

6. And as to paragraph eight of the bill of complaint, this respondent admits that the plaintiff owns and has on hand for sale within the State of Maryland, a large and valuable quantity of various liquors, as charged, and that prior to said injunction the plaintiff was doing a lucrative business in shipping such liquors to persons in West Virginia, upon their personal orders, for their own personal use as charged, and further admits that all such business done with persons upon their unsolicited orders for said liquors for their own personal use, were in no wise contrary to the laws of West Virginia, or any Federal law as charged, and further admits that by the refusal of this respondent to ship any of said liquors in interstate commerce, the plaintiff is prevented from making any shipments of liquor over the railroad line of this respondent to any points in said three counties of West Virginia, as charged, and further admits that this respondent has informed the plaintiff and has heard and believes that said Express Company, has also informed it that each of them solely by reason of the pendency of said injunction, will hereafter refuse to accept any of said liquors for transportation to the plaintiff's customers in said three counties in West Virginia as charged, and further admits, as charged that there is no other line of railroad or other practicable means of transportation by which the plaintiff can serve a large part of its said customers in said three counties of West Virginia, except by the

25 interstate line of railway of your respondent or ship any of said liquors into any of said three counties as long as said injunction is pending, and plaintiff's said business to this extent will be destroyed and that the plaintiff will lose a large and profitable business in this regard, and a large amount of profits and respondent does not deny that said loss of profits of the plaintiff will, if said shipments are discontinued, amount to more than the sum of Three Thousand Dollars, exclusive of interest and costs, as charged, and does not deny therefore that the matters in dispute in this case exceed the value of three thousand dollars, exclusive of interest and costs as charged.

7. And answering the ninth paragraph of the bill of complaint, respondent says that it denies that it is continuing from day to day to violate its duty as such interstate carrier, by refusing to accept and furnish transportation for the aforesaid liquors upon the reasonable requests of the plaintiff of its said lawful goods, wares and merchandise, which it desires to ship to its customers in said three counties of West Virginia, as charged, and denies for the reasons aforesaid, and which will be more fully hereinafter set out, that it is acting in defiance of its duty as prescribed by Section 1, of said Act of Congress, commonly called an Act to regulate commerce, and the amendments thereof, as charged, and denies that respondent has already violated and is continuing from day to day to violate the provisions of Section 3, of said Act, by subjecting the plaintiff and its aforesaid business and traffic in said liquors, to an undue and prejudiced disadvantage as charged, and denies that respondent, by its said conduct has illegally destroyed the aforesaid lawful interstate traffic and business of the plaintiff with its said customers in

26 said three counties of West Virginia, as charged, and denies that it is obnoxious to the condemnation of the provisions of said Section 3, of said Act, or that the plaintiff is entitled to all the rights and remedies against this respondent provided by said Act of Congress, as charged, but on the contrary says that its aforesaid reasons and grounds for its refusal to make said shipments are valid and legal reasons for such refusal.

8. And as to paragraph ten of said bill of complaint, respondent says that it admits that if respondent continues to refuse said shipment of plaintiff's said liquors into said three counties of West Virginia, its alleged violation of said Act of Congress, will of course be of almost daily occurrence, and respondent further admits that suits at law for said supposed violations, of said Act of Congress would afford the plaintiff no full, complete and adequate remedy for said supposed wrongs, but would result in a vast multiplicity of suits as charged, and further admits that under the allegations of the bill of complaint, this Honorable Court has jurisdiction in equity, to adjudicate and determine the whole matter in controversy between this respondent and the plaintiff.

9. This respondent having now answered all the material allegations in the bill of complaint, for further answer thereto says: that on or about the 10th day of August, 1914, the State of West Virginia at the instance of the Honorable Fred O. Blue, State Commissioner of Prohibition, of the State of West Virginia, filed a bill of complaint in equity against this respondent in the Circuit Court of Tucker County, State of West Virginia, addressed to the Honorable F. M. Reynolds, Judge of said Court, he having jurisdiction of the Circuit Court of West Virginia, throughout the counties of Mineral, Grant and Tucker, in said State of such matters in equity, wherein said State recited the aforesaid Act of the Legislature of

27 West Virginia, effective on and after the first day of July, 1914, and recited the provisions of the Act of Congress commonly known as the Wilson Act, and recited the provisions of the Act of Congress, commonly known as the Webb-Kenyon Act, approved March 1, 1913, and thereafter in said bill of complaint charged that certain firms and corporations in the State of Maryland were violating said Act of the Legislature of West Virginia, and said Acts of Congress in the matter of shipping liquors from said State of Maryland into said State of West Virginia, in said three counties contrary to said Acts and laws, and charging further that said alleged illegal shipments of liquor into West Virginia were being made over the interstate line of railway of this respondent, from Cumberland, Maryland, into West Virginia, contrary to said laws, and praying in said bill of complaint for an order of said Court of Tucker County, granting an injunction to said State of West Virginia against this respondent, restraining this respondent from shipping any liquors from Maryland into said three counties of West Virginia, except under certain particularly enumerated requirements imposed upon this respondent.

And respondent further says that thereafter on the 11th day of August, 1914, upon the presentation of said bill of complaint of the

State of West Virginia, to the Honorable F. M. Reynolds, Judge of said Circuit Court of Tucker County, West Virginia, said Court granted said order of injunction against respondent, and filed and issued the same against respondent in the words following to-wit:

"Restraining and enjoining it, its agents and employes, from accepting any liquors from non-resident consignors for carriage and delivery thereof to consignees who are citizens and residents of said County of Tucker, or elsewhere within the jurisdiction of the Court unless said defendant railway has first ascertained, by acting in good

28 faith, with due diligence and caution, that such liquors were ordered by the consignees for their lawful, personal use, without solicitation on the part of the consignors, and that such liquors were offered by the consignors for acceptance and delivery thereof by the said defendant, to the consignees for their lawful, personal use, without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said State; and from delivering liquors to any consignee in said county of Tucker, or elsewhere within the jurisdiction of the Court, unless said railway company has first ascertained, by acting in good faith, with due diligence and caution that such consignees ordered such liquors for their lawful, personal use, without solicitation on the part of the consignors, and without intention, by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of said State; and from delivering liquors to any person in said County of Tucker, or elsewhere within the jurisdiction of the Court, when such liquors were procured for himself or for himself and those associating with him to be received or kept for the purpose of use or gift as a beverage or for distribution or division among himself and those associating with him at any place which is kept or maintained by himself or by associating with others, or which he, by himself, or by associating with others, in any manner aids, assists or abets in keeping or maintaining, and from delivering liquors within the county of Tucker or elsewhere within the jurisdiction of said Court, to any person, unless the consignee signs the defendant's liquor record in his own proper person, and not in the name of some fictitious person, or otherwise, and then only when the consignee has ordered the same for his personal, lawful use with no intention that the liquor so delivered is to be received, possessed, sold or in any manner used in said State in violation of any law thereof."

And this respondent now charges that on or about the 14th day of August, 1914, said injunction of said Court was duly served upon this respondent, and it now files herewith as part of this answer, a copy of said bill of complaint of the State of West Virginia, and of said order for said injunction granted by the said Circuit Court of Tucker County, in said State, marked, Respondent's Exhibits Nos. 1 and 2.

10. Respondent now charges that it must be perfectly obvious to this Court that respondent could not and cannot undertake to ship any liquors whatever in interstate commerce from the State of Maryland to said three counties in West Virginia, under the requirements

and restrictions set out in said injunction; that the performance by this respondent of many of said requirements is not only physically and financially, but psychologically impossible, especially said requirements that before accepting any such interstate shipment of liquor for transportation, respondent shall first ascertain by acting in good faith, and with due diligence and caution, that such liquors offered for shipment were ordered by the consignees for their lawful, personal use, without solicitation on the part of the consignors, without the intention by any person interested therein, to be received, possessed, sold or in any manner used in violation of any law of said State, and said requirement that before respondent should deliver any such liquors to any consignee in said three prohibited counties, it shall first ascertain by acting in good faith and with due diligence and caution, that such consignees ordered such liquor for their lawful, personal use, without solicitation on the part of the consignors, and without intention, by any person interested therein, to be received, possessed, sold or in any manner used in violation of any law of said State, and said requirement that respondent should not deliver any such liquors to any person in said three prohibited counties, when such liquors were procured for said person or for himself and those associating with him, to be received or kept for the purpose of use or gift as a beverage or for any distribution or division among himself and those associating with him, at any place which is kept or maintained by himself by associating with others, or which he by himself or by associating with others in any manner, aids, assists or abets in keeping or maintaining.

11. Respondent now charges that by said requirements of said injunction, it is not only required, before it accepts any liquors for such shipments, to use all reasonable efforts in good faith, to inform itself as to whether said liquors were ordered by the consignees
30 without solicitation of the consignor or others, and is not only required before it accepts said liquors for shipment to use all reasonable efforts to ascertain whether or not they are intended by the consignee for his own personal use, but by the requirements of said injunction, before accepting said liquors for shipment, this respondent is required to ascertain as a fact, and in short, to know, whether or not said liquors were ordered upon said solicitation and whether or not the consignee intends them for his own personal use, and these things this respondent is required to ascertain as a fact and to know before it even accepts the goods for shipment, and that in order to comply with this requirement respondent would be obliged to keep at its points of shipment in Maryland, and at each of its points of delivery along its railway line in said three counties of West Virginia, a large and extra force of detectives and investigators to ascertain said facts, said force of detectives, etc., to be ready at all said stations in Maryland and West Virginia, at a moment's notice to go out throughout the jurisdiction of said three counties, and throughout the several towns and places of shipment in Maryland, and in other States, to endeavor to ascertain as a fact whether said shipments were being made upon solicitation or were being

intended for uses other than the personal use of the consignees, and that the cost of keeping, paying and maintaining such a force of investigators would impose such an intolerable financial burden upon this part of the interstate commerce of respondent, that all profits it might receive by way of freight for said shipments over its line would be many times over consumed in the maintenance of said corps of investigators, and that as to said consignees, all the investigation in the world would not enable your respondent to ascertain as a fact, or to know, what use the said consignees in-

31 tended to make of said liquors, and that for psychological reasons this respondent never could ascertain from said consignees as a matter of fact what was their intention relative to the use of said liquors, because said investigators could not read the mind of said consignees and ascertain their intent and because said consignees themselves might at the time said liquors were offered for shipment by the consignor, intend to use it for their own personal use, and after receiving them change their minds, and devote said liquors to purposes unlawful under the law aforesaid, and this respondent not only says therefore that it is obvious on the face of said injunction that it is impossible for respondent to comply with said requirements before shipping said liquors, but charges as a fact, which will be proved at the hearing that the performance of all said conditions are, for the reasons aforesaid, impossible on the part of this respondent.

12. Respondent therefore says that it being impossible to comply with said requirements of said injunction, it is advised that said injunction amounts to an absolute prohibition on this respondent restraining it from shipping any liquors whatever from the State of Maryland or elsewhere outside of the State of West Virginia, into said three prohibited counties in the latter State, and for these reasons alone respondent now says that since the service of said injunction upon it, it has refused to ship over its line in interstate commerce from points outside the State of West Virginia, into said three prohibited counties, any intoxicating liquors of any kind whatever, including the said shipment of alcohol offered by the plaintiff, and has informed the plaintiff and all others offering said shipments that

as long as said injunction is in force and not dissolved or
32 modified, respondent will continue to refuse all said shipments, whether or not they are claimed to be lawful as aforesaid under the law of West Virginia and the said Federal law, and now pleads and avers all the foregoing matters and things as a perfectly valid and lawful excuse at law or in equity for its refusal to accept plaintiff's shipment of alcohol, and for its notice to plaintiff that it would continue to refuse all further shipments of liquor from points outside of Maryland, into the prohibited counties of West Virginia.

This respondent having now fully answered the bill of complaint, prays to be hence dismissed with its costs.

BENJ. A. RICHMOND,
Sol. for Respondent.

STATE OF MARYLAND,
Allegany County, To wit:

I hereby certify that on this — day of September, 1914, before me, the subscriber, a Notary Public, in and for the county and State aforesaid, personally appeared Charles A. Steiner, Superintendent of the West Virginia Division of the Western Maryland Railway Company, the defendant in the above case, and made oath in due form of law that he is familiar with the matters of fact set out in the foregoing answer, and that as to all matters of fact set out in said answer they are true to the best of his information, knowledge and belief, and that as to all matters of belief therein set out, that he believes them to be true.

Witness my hand and Notarial Seal.

[NOTARY'S SEAL.]

GROVER J. DONAHOE,
Notary Public.

My Commission Expires May 1, 1916.

33

RESPONDENT'S EXHIBIT No. 1.

Filed September 14, 1914.

In the Circuit Court of Tucker County, West Virginia.

In Equity.

THE STATE OF WEST VIRGINIA, Who Brings Her Suit at the Instance of Fred O. Blue, State Commissioner of Prohibition, Plaintiff,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a corporation Under the Laws of the State of Maryland, Duly Authorized to do Business in the State of West Virginia.

To the Honorable F. M. Reynolds, Judge of the Circuit Court of Tucker County:

The bill of complaint and prayer of the State of West Virginia, who brings her suit at the instance of Fred O. Blue, State Commissioner of Prohibition, against the Western Maryland Railway Company, a corporation under the laws of the State of Maryland, duly authorized to do business in the State of West Virginia.

1. Complaining, plaintiff says that she is a body politic and a sovereign state, and that the defendant, The Western Maryland Railway Company, is and was at times herein referred to, a corporation under the laws of the state of Maryland, duly authorized to do business in the state of West Virginia, and is a common carrier, operating in certain counties within the states of Maryland, Pennsylvania and West Virginia; that the counties in West Virginia wherein the defendant operates are Mineral, Grant, Tucker, Randolph, Barbour and Pocahontas; that said defendant railway company operates

34 freight and passenger trains over its lines, and has and maintains quite a large number of stations within said states aforesaid, at which stations it receives and delivers freight of all kinds and quantities; that among other stations in West Virginia so maintained are those at the towns of Thomas, Davis, Parsons and Hendricks, in the county of Tucker; that the main line of defendant railway company runs from the city of Baltimore, Maryland, to Elkins, West Virginia, passing through the city of Cumberland and the town of Westernport, said last named city and town both being in said state of Maryland, at which places the defendant has and maintains stations and offices, where it receives and delivers freight offered it for transportation.

2. Plaintiff further represents that at the general election held in the State of West Virginia in November, 1912, the people of said State ratified a proposed amendment to the constitution of said State, whereby that on and after the first of July, 1914, the manufacture, sale and keeping for sale of malt, vinous, or spirituous liquors should be prohibited in said State; that said amendment so ratified was and is in the words and figures following:

"SEC. 46. On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wines, ale, porter, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this State. Provided, however, that the manufacture and sale and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the legislature may prescribe. The legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

3. Plaintiff further says that at the regular session of 1913, the legislature of West Virginia enacted chapter 13, Acts of 1913, the State Prohibition Law, in effect on and after July 1st, 1914, said act being enacted for the purpose of carrying into effect the provisions of the said constitutional amendment aforesaid.

35 4. Plaintiff further represents that under the laws of the State of West Virginia, on and since the first day of July, 1914, it has been unlawful to manufacture, sell, keep or store for sale, or offer or expose for sale, within said State, liquors as liquors are defined by Section one of said act aforesaid; and further, that on and after the first day of July, 1914, it has been unlawful within said State for any person, acting for himself, or by, for or through another, to manufacture or sell, or keep, store, offer or expose for sale, or solicit or receive orders for, any liquors, as liquors are defined by Section 1 of said act aforesaid; and further, that on and after the first day of July, 1914, it has been unlawful within said State for one to act as the agent or employe of the purchaser of liquors, as liquors are defined by said act; and further, that on and after the 1st day of July, 1914, in case of a sale of liquors, in

which a shipment or delivery thereof is made by a common or other carrier, the sale thereof shall be deemed to be made in the County wherein the delivery of such liquors is made by such carrier to the consignee, his agent or employe.

5. Plaintiff further represents that on and since the first day of July, 1914, it has been unlawful within said State, for any person to advertise or give notice, by signs, billboards, newspapers, periodicals, or otherwise, for himself or another, of the sale or keeping for sale of liquors, or to circulate or distribute any price lists, circulars or order blanks advertising liquors, or publish any newspaper, magazine, periodical, or other written or printed papers in which such advertisements or notices are given.

36 6. Plaintiff further represents that the Cumberland Brewing Company is a maker and manufacture- of beer, owning and operating a large brewery; the Cash Liquor Store is a liquor house, John A. Whitman is a liquor house, Smith and Roman is a liquor firm, James Clark Distilling Company is a distiller and seller of liquors, C. A. Hice is a retail jug and bottle liquor house, the German Brewing Company is a brewer and seller of beer, The Diamond Liquor House, all of said City of Cumberland, and Peter Weisengoff, a liquor dealer of said town of Westernport, all of whom, as well as others not named herein, are engaged in the business of either Manufacturing or selling, or both, liquors as defined by said act, and all and each are engaged in the effort to receive orders and make sales and shipments of liquors to citizens residing in the State of West Virginia, particularly along the line of the defendant railway company. That some of said firms and manufacturers, if not all, have in various ways sought to advertise or give notice of their business to citizens and residents of West Virginia, and have in various ways, circulated and distributed price lists, circulars and order blanks, soliciting orders for and advertising liquors to the citizens of West Virginia, thereby bringing to the attention of such citizens and residents the articles of liquor kept and stored for sale by them respectively, to induce citizens and residents of said State to give orders for liquors they otherwise would not have thought of giving; that for the purpose of delivering liquors to the citizens and residents of said State along the line of the defendant railway company, including the said county of Tucker, said persons and firms have shipped by defendant railway company such liquors to divers citizens and residents of West Virginia, for delivery to said citizens and residents at stations

37 on the line of said defendant railway, within the State of West Virginia, including citizens residing in the County of Tucker. That in addition to shipping liquors by the defendant railway company, said persons and firms aforesaid also have shipped such liquors by the American Express Company, an express carrier, operating over the line of the defendant railway company. And thereupon, and as illustrative of the liquor carried and delivered by the defendant railway company from liquor dealers in the State of Maryland to citizens and residents of the State of West Virginia, including citizens and residents residing at the town of Thomas in

the County of Tucker, within said State, plaintiff avers and charges that on one day, to-wit, the 3rd day of July, 1914, there was received at said City of Cumberland and town of Westernport for carriage and delivery by the defendant railway company to citizens and residents of the town of Thomas, said county of Tucker, a large number of different consignments of liquors, and which liquors were carried and delivered for the consignors to the consignees at said town of Thomas by the defendant railway company, as follows:

Cumberland Brewing Company, to R. Seionto, 2 kegs 16 gal. beer;
 Peter Weisengoff, to Fucile Salvatore, 2 bbl. beer;
 Peter Weisengoff, to Joe Zamon, 2 kegs beer, 16 gal.;
 Peter Weisengoff, to Frank Kozele, 2 kegs beer, 16 gal.;
 Peter Weisengoff, to Mike Grohauchi, 2 kegs beer, 2 bx. 2 gal. W.;
 Peter Weisengoff, to Frank Gnojoke, 2 kegs beer, 1 gal. Wh'y;
 Peter Weisengoff, to Joe Zupet, 2 kegs beer; 16 gal.;
 Peter Weisengoff, to Jno. Rugel, 3 kegs beer, 24 gal.;
 Peter Weisengoff, to Geo. Kozlonches, 2 kegs 16 gal.; 2 box 2 gal. Wh'y;

Cumberland Brewing Company, to C. Statthum, 2 bbl. 240 pt. beer;
 Cumberland Brewing Co., to J. Rosulic 2¼ bbl. 16 gal. beer;

38 Cumberland Brewing Co., to J. Kozlicax, 2-¼ bbl. 16 gal. beer;

Cumberland Brewing Co., to Joe Gusodoric, 5-¼ bbl. 40 gal. beer;
 Cumberland Brewing Co., to F. Klenrock, 4-¼ bbl. 32 gal. beer;
 Cumberland Brewing Co., to P. Mone, 5-¼ bbl. 40 gal. beer;
 Cumberland Brewing Co., to F. Garbacki, 4-¼ bbl. 32 gal. beer;
 Cumberland Brewing Co., to J. Mtroga, 5-¼ bbl. 40 gal. beer;
 Cumberland Brewing Co., to J. Milkrit, 2-¼ bbl. 16 gal. beer;
 Cumberland Brewing Co., to F. Frederick, 5-¼ bbl. 40 gal. beer;

And the plaintiff further represents and charges that the defendant railway company, from the first day of July, 1914, to the 21st day of July, 1914, inclusive, received from liquor dealers, out of the State, and carried and delivered to citizens and residents at said town of Thomas, West Virginia, approximately three hundred separate consignments of liquors; and further, as illustrative of the disposition and efforts on the part of non-resident liquor dealers to sell and deliver liquors to citizens and residents of Thomas, plaintiff further represents that there were carried and delivered by the American Express Company, an express carrier operating over lines of the defendant railway company, within said period of twenty-one days aforesaid, approximately three hundred and fifty separate express packages of liquors to citizens and residents of said town of Thomas. And plaintiff further represents and charges that, in a greater or less degree, the defendant railway company has been and is receiving liquors from the aforesaid liquor dealers, as well as others, not herein named, for carriage and delivery to citizens and residents of the State of West Virginia, at the several stations of defendant in said State.

39 Plaintiff is advised and so charges that the sales of such liquors, under and by virtue of the laws in such cases made

and provided, were made at the place of delivery by the carrier to the consignee of such liquors, in all instances wherein such liquors were shipped by the consignors, upon orders solicited in any way by them from the consignees within the State of West Virginia, or when intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of the State of West Virginia.

7. Plaintiff further represents that by an act of the United States Congress, known as the Wilson Act, (26 Stat. 713, c. 728) it is provided:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

8. Plaintiff further represents that by act of the United States Congress passed subsequent to the Wilson Act, and known as the Webb-Kenyon Act (Act. Cong. March 1, 1913, c. 90, 37, Stat. 699) it was provided:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, fermented, or other intoxicating liquor of any kind, from one State, Territory or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

40 And plaintiff further represents that she is advised and so charges that the defendant railway company, on and since the first day of July, 1914, could not, nor can it now, lawfully deliver any liquors to any persons in West Virginia, except to those who have ordered the same for their lawful, personal use, without solicitation on the part of the consignor, nor lawfully deliver any liquors to the consignees thereof when such liquors were or are intended by any person interested therein to be received, possessed, sold or in any manner used in said State in violation of any of the laws thereof. And thereupon plaintiff further says that she is advised and so charges that it was and is the duty of the

defendant railway, through its agents and employes, before acceptance of liquors from non-resident consignors for carriage and delivery thereof to consignees in West Virginia, to ascertain, by acting in good faith, with due diligence and caution, whether such liquors were ordered by the consignees for their lawful personal use, without solicitation on the part of the consignors, and whether such liquors were offered by the consignors for acceptance and delivery thereof by the defendant to the consignees for their own lawful, personal use, without intention by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of the said State of West Virginia.

9. Plaintiff further says that she is advised and so charges that the defendant railway company, through its agents and employes, has been accepting, on and since July 1, 1914, and is yet accepting, (perhaps inadvertently) liquors from non-resident consignors for carriage and delivery thereof to consignees in the said State of West Virginia, among others being consignments of such liquors to citizens and residents of said County of Tucker, without
41 having first ascertained, by acting in good faith with due diligence and caution, from the consignors and consignees, respectively, whether such liquors were ordered by the consignees for their own lawful, personal use, without solicitation on the part of the consignors, and whether such liquors were offered by the consignors for acceptance, carriage and delivery thereof by the defendant to the consignees, for their own lawful personal use without intent by any person interested therein to be received, possessed, sold, or in any manner used in said State of West Virginia in violation of any of the laws thereof; and that said defendant, through its agents and employes, has made delivery of such liquors to citizens and residents in the said county of Tucker, without having ascertained, by acting in good faith, with due diligence and caution, whether such liquors were ordered by the consignees for their lawful, personal use without solicitation on the part of the consignors, and whether such liquors were to be received, possessed, or in any manner used by any person interested therein in violation of any law of said State.

10. Plaintiff further represents that on and since the first day of July, 1914, it has been unlawful in said state of West Virginia for any person to associate with others to aid, assist, or abet in keeping and maintaining any club house, or other place, in which any liquor is received or kept for the purpose of use, gift, barter, or sale as a beverage, or for distribution or division thereof among the members of any club or association by any means whatsoever, and thereupon the plaintiff further says she is informed and so charges that at certain towns in West Virginia on the line of the defendant railway, including the said town of Thomas, liquors are procured by persons associating together for the purchase thereof, such liquors being ordered and shipped in the name of one of the parties so
42 associating together, usually in the name of one known as the "boarding boss", such liquors so purchased being intended for the joint use of those so associating together, the

individual members whereof are usually known as "boarders"; that such liquors are purchased out of a joint fund to which the "boarders" contribute and are received, usually, in the name of the "boarding Boss", although at times in the name of one of the "boarders", and are kept, stored and distributed at a common place kept or maintained by the "boarding boss" himself, or by the said "boarding boss" and those associating with him as "boarders", or by one of said "boarders" and those associating with him as "boarders" or by the "boarders" themselves, associating together for the purpose of use or gift, as a beverage, or for distribution or division among the "boarders"; and such liquors are there used or given away as a beverage by those who so associate together. And thereupon plaintiff is advised and so charges, as she is informed and believes, that liquors have been shipped by non-resident liquor dealers, carried by the defendant railroad company, and delivered by it to the "boarding boss", or member of an association as aforesaid; and particularly does plaintiff charge that the defendant railway company, by and through its agents, on or about the 24th or 25th day of July, 1914, delivered to one Tom Joby, a "boarding boss", at house No. 47 B, said town of Thomas, four eight-gallon kegs of beer and one gallon of whiskey, which liquor was received by said "boarding boss" for the purpose of use or gift as a beverage and for distribution or division among the "boarders" who had contributed either directly or indirectly, to a common fund for the purchase of said liquors, and who kept or maintained a common place, where such liquors were stored or kept, and distributed or divided among those associating together. And thereupon plaintiff further says

43 she is advised and so charges that on and since the first day of July, 1914, it has been and is the duty of the defendant railway company, by and through its agents, to make no deliveries of liquors to any person in West Virginia except to a person who ordered the same for his own lawful, personal use, and not for the use of others, particularly any association of persons associating for the purpose of purchasing liquors to be kept and stored at a place kept or maintained by them in the manner as aforesaid, and there used or given away as beverages or distributed or divided among those associating together.

11. Plaintiff further represents that she is advised and so charges that consignees of liquors have endeavored to, and probably have in some instances, procured deliveries thereof from the defendant railway company, at stations in the said county of Tucker, by the use of fictitious names and otherwise. And thereupon the plaintiff further says she is advised and so charges that it is and has been the duty of the defendant railway company, since the 1st of July, 1914, to deliver no liquors except upon the signing of the record by the consignee thereof, in his own proper person, and then only when the consignee has ordered the same for his personal, lawful use, with no intention that the liquor so delivered is to be received, possessed, sold, or in any manner used in said state in violation of any laws thereof.

12. Plaintiff is advised and so charges that notwithstanding that

the brewery and liquor dealers hereinbefore named are non-residents of the state, yet nevertheless they do not have the right, under the interstate commerce clause of the federal constitution, to solicit orders for liquors nor to sell liquors in the state of West Virginia, nor to ship liquors into the state of West Virginia, when the same are intended by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of

44 the said state, and that the interstate character of such liquors, as advertised or sold by them, is divested by the Webb-Kenyon act in all instances wherein they advertise, solicit or sell liquors in the state of West Virginia or to any citizen thereof in the said state, when any such liquors are intended by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said state.

13. Plaintiff further says she is advised and so charges that it is the purpose of said brewers and liquor dealers aforesaid, as well as other outside brewers and liquor dealers, to advertise their liquors in the state of West Virginia, and to solicit in said state, from the citizens thereof, orders for liquors, and that they intend to ship into West Virginia by defendant railway company, the liquors advertised by them and which they have for sale, particularly along the line of the defendant railway in the state of West Virginia, regardless of the purpose or use the consignee may have respecting such liquors. That it is the purpose of the outside liquor dealers to ship their liquors over the line of the defendant railway to any person in West Virginia who may order the same without ascertaining, and regardless of, the purpose or use the consignee may have respecting such liquors, and that the defendant railway company has been and will continue to carry and deliver such liquors to such citizens and residents of such state, including those residing in said county of Tucker; and therefore to permit the defendant railway company to deliver such liquors is to make the same a common nuisance for the keeping, storing, selling and delivering of liquors within the state of West Virginia, if the defendant railway company is permitted to deliver such liquors to the consignees

45 when the liquors are to be received, possessed, sold or in any manner used by the consignee in violation of the law of the state of West Virginia.

14. Plaintiff therefore further represents that inasmuch as the outside liquor dealers are beyond the jurisdiction of the criminal courts of the state, and perhaps may therefore escape criminal prosecution under the laws of said state, she having no assurance that she can procure the persons of such outside liquor dealers for the purpose of trial, she is therefore advised and so charges that she has the right to invoke the aid of a court of equity to restrain and enjoin the defendant, The Western Maryland Railway Company, from delivering any consignment of liquors from outside liquor dealers to any point upon the line of said carrier or elsewhere in the state of West Virginia within the jurisdiction of the court, unless the said defendant, through its agents and employes, before acceptance of liquors from non-resident consignors, for carriage and delivery thereof to con-

signees in said county of Tucker, ascertain, by acting in good faith, with due diligence and caution, whether such liquors were ordered by the consignees thereof for their lawful, personal use, without solicitation on the part of the consignors, and whether such liquors were offered by the consignors for acceptance and delivery thereof by the defendant to consignees for their lawful, personal use, without an intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of said state of West Virginia.

In consideration of the premises, and inasmuch as plaintiff is without adequate remedy save in a court of equity, she therefore prays that she may be awarded an injunction against the

46 said defendant, The Western Maryland Railway Company, restraining and enjoining it, its agents and employes, from accepting any liquors from non-resident consignors for carriage and delivery thereof to consignees who are citizens and residents of said county of Tucker, or elsewhere within the jurisdiction of the court, unless said defendant railway company has first ascertained, by acting in good faith, with due diligence and caution, that such liquors were ordered by the consignees for their lawful, personal use, without solicitation on the part of the consignors and that such liquors were offered by the consignors for acceptance and delivery thereof by the said defendant, to the consignees for their lawful, personal use, without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said state; and from delivering liquors to any consignees in said county of Tucker, or elsewhere within the jurisdiction of the court, unless said railway company has first ascertained, by acting in good faith, with due diligence and caution, that such consignees ordered such liquors for their lawful, personal use, without solicitation on the part of the consignors, and without intention, by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of said state; and from delivering liquors to any person in said county of Tucker, or elsewhere within the jurisdiction of the court, when such liquors were procured for himself or for himself and those associating with him, to be received or kept for the purpose of use or gift as a beverage or for distribution or division among himself and those associating with him at any place which is kept or maintained by himself or by associating with

47 others, or which he, by himself, or by associating with others, in any manner aids, assists or abets in keeping or maintaining; and from delivering liquors within the county of Tucker or elsewhere within the jurisdiction of said court, to any person, unless the consignee signs the defendant's liquor record, in his own proper person, and not in the name of some fictitious person, or otherwise, and then only when the consignee has ordered the same for his personal, lawful use with no intention that the liquor so delivered is to be received, possessed, sold or in any manner used in said state in violation of any law thereof. And that the defendant, The Western Maryland Railway Company, be declared a common nuisance, and abated as such, in so far as it may undertake to handle

or deliver any liquors within the said county of Tucker, or elsewhere within the jurisdiction of the court, other than is consistent with the allegations and prayer of this bill; and may the defendants named in the caption of this bill be made parties defendant hereto; and may the plaintiff have all such other, further, general and special relief as the nature of her case may require or to equity may appertain.

And she will ever pray, etc.

STATE OF WEST VIRGINIA,
Who Brings Her Suit at the Instance of Fred
O. Blue, State Commissioner of Prohibition,
By COUNSEL.

_____,
Counsel for Plaintiff.

48 STATE OF WEST VIRGINIA,
County of _____, To wit:

Fred O. Blue, being duly sworn, says that he is State Commissioner of Prohibition for the State of West Virginia, the plaintiff named in the foregoing bill, and that he knows the contents thereof; that the facts and allegations therein contained are true, except such as are therein stated upon information and belief, and that as to such allegations he believes them to be true.

Taken, sworn to and subscribed before me this — day of August, 1914.

My commission expires on the — day of —, 19—.

_____,
Notary Public in and for the said County and State.

49 RESPONDENT'S EXHIBIT No. 2.

Filed September 14, 1914.

In the Circuit Court of Tucker County, West Virginia.

In Equity.

THE STATE OF WEST VIRGINIA, Who Brings Her Suit at the Instance
of Fred O. Blue, State Commissioner of Prohibition, Plaintiff,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation Under
the Laws of the State of Maryland, Duly Authorized to Do Business in the State of West Virginia.

This day, in Vacation for the Circuit Court of Tucker County, came the plaintiff, State of West Virginia, who brings her suit at the instance of Fred O. Blue, State Commissioner of Prohibition, against The Western Maryland Railway Company, a corporation under the laws of the State of Maryland, duly authorized to do business in the state of West Virginia, and presented her bill, duly verified, to the undersigned Judge of the said Court, praying that she

may be awarded an injunction against the said defendant, The Western Maryland Railway Company, restraining and enjoining it, its agents and employes, from accepting any liquors from non-resident consignors for carriage and delivery thereof to consignees who are citizens and residents of said county of Tucker, or elsewhere within the jurisdiction of the court, unless said defendant railway has first ascertained by acting in good faith, with due diligence and caution that such liquors were ordered by the consignees for their lawful, personal use, without solicitation on the part of the consignors, and that such liquors were offered by the consignors for acceptance and delivery thereof by the said defendant, to

50 the consignees for their lawful, personal use, without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said state; and from delivering liquors to any consignee in said county of Tucker, or elsewhere, within the jurisdiction of the court, unless said railway company has first ascertained, by acting in good faith, with due diligence and caution, that such consignees ordered such liquors for their lawful personal use, without solicitation on the part of the consignors, and without intention, by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of said state; and from delivering liquors to any person in said county of Tucker, or elsewhere within the jurisdiction of the court, when such liquors were procured for himself or for himself and those associating with him to be received or kept for the purpose of use or gift as a beverage or for distribution or division among himself and those associating with him at any place which is kept or maintained by himself or by associating with others, or which he, by himself, or by associating with others, in any manner aids, assists, or abets in keeping or maintaining; and from delivering, liquors, within the county of Tucker or elsewhere within the jurisdiction of said court, to any person unless the consignee signs the defendant's liquor record, in his own proper person, and not in the name of some fictitious person, or otherwise, and then only when the consignee has ordered the same for his personal, lawful use with no intention that the liquor so delivered is to be received, possessed, sold or in any manner used in said state in violation of any law thereof, And that the defendant, The

Western Maryland Railway Company, be declared a common nuisance, and abated as such, in so far as it may undertake to handle or deliver any liquors within the said county of Tucker, or elsewhere within the jurisdiction of the court, other than is consistent with the allegations and prayer of said bill.

And said bill, having been read and considered, the injunction as therein prayed for is hereby awarded, and the said defendant, The Western Maryland Railway Company, its agents and employes, are hereby enjoined and restrained as prayed for in said bill, as above set forth in this order, which injunction is awarded without bond required of the plaintiff.

It is further ordered that an attested copy of this order be served upon the said defendant, The Western Maryland Railway Company,

which service shall have the effect of enjoining the said railway company according to the prayer of said bill and the injunction hereby awarded. And the Clerk of the Circuit Court of Tucker County is hereby directed and order to enter this order in the Chancery Record book of the Circuit Court of Tucker county, as a vacation order.

Done in Vacation in and for the Circuit Court of Tucker county, at Keyser, Mineral County, West Virginia, this tenth day of August, nineteen hundred and fourteen.

F. M. REYNOLDS,
*Judge of the Circuit Court of
Tucker County, West Virginia.*

To Lawrence Lipscomb, Clerk of the Circuit Court of Tucker County.

F. M. R.

Received and entered here, in vacation, this the 11th day of August, 1914.

Attest:

LAWRENCE LIPSCOMB, *Clerk,*
By F. W. PRITT, *Deputy.*

A Copy. Attest:

LAWRENCE LIPSCOMB, *Clerk.*
By F. W. PRITT, *Deputy.*

52 *Petition of the State of West Virginia to be Made a Party to this Case and Order of Court Thereon.*

Filed October 19, 1914.

In the District Court of the United States in and for the District of Maryland.

In Equity.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,
vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

To the Honorable John C. Rose Judge of the District Court of the United States for the District of Maryland, sitting at Cumberland, Maryland:

The Petition of the State of Maryland, a Body Politic and a Sovereign State, Tendered and by Leave of the Court Filed in the Above-entitled Cause.

Your petitioner, the State of West Virginia, respectfully represents:

1. That she is a body politic and a sovereign State.
2. That heretofore, to-wit, on the tenth day of August, 1914, she

presented her bill to the Honorable F. M. Reynolds, Judge of the Circuit Court of Tucker County, said State of West Virginia, (Tucker County being one of the counties composing the Sixteenth judicial circuit of said State) praying for order of injunction as
53 therein set out, and a duly attested copy of said bill is now herewith filed, marked "Petitioner's Exhibit No. 1," and is prayed to be taken and read herewith as part hereof.

That said Judge of said Circuit Court of Tucker County, having considered said bill and the prayer thereof, on said tenth day of August, 1914, awarded injunction as therein prayed for. A duly attested copy of said order awarding the injunction is now here filed, marked "Petitioner's Exhibit No. 2," and is prayed to be taken and read herewith as further part hereof.

Petitioner further represents that she now here adopts the allegations set forth in said bill for all purposes as though the allegations therein set forth were herein set forth in extenso.

Petitioner further represents that the plaintiff, the James Clark Distilling Company, a corporation, on and since the first day of July, 1914, has by printed or written circular letters, order blanks and price lists, solicited citizens of the State of West Virginia, particularly citizens thereof residing in said Sixteenth Judicial circuit aforesaid, to give orders to said plaintiff, the James Clark Distilling Company, for intoxicating liquors. That the purpose of such letters, circulars, order blanks etc., was to procure from the citizens of the State of West Virginia, particularly those residing within said Sixteenth judicial circuit aforesaid, orders for intoxicating liquors to be filled by the plaintiff the James Clark Distilling Company; that the said James Clark Distilling Company intended to accept such orders and to ship such intoxicating liquors to such citizens aforesaid by the defendant, the Western Maryland Railway Company.

54 Petitioner further charges that the plaintiff, the James Clark Distilling Company, has been, on and since the first day of July, 1914, shipping intoxicating liquors into the State of West Virginia, to the citizens thereof, without any effort to ascertain the character, ages and habits of the person- who ordered the same, nor the purposes to which they intended to put such intoxicating liquors.

3. Petitioner further represents that, by provisions of the statute of your petitioner relative to intoxicating liquors in case of any sale, and the shipment of intoxicating liquors into the State of West Virginia, by common or other carrier, the sale thereof is deemed to be made at the county wherein the intoxicating liquors are delivered. That the statutes of your petitioner, respecting intoxicating liquors, forbid the sale of or soliciting of orders for any intoxicating liquors in the State, except the sale of pure grain alcohol, by wholesale druggists to retail druggists and by retail druggists upon prescription of reputable physicians or upon affidavit of the purchaser, but only then when to be used for medicinal, pharmaceutical, mechanical or scientific purposes; wine may also be sold under the laws of your petitioner when intended to be used for sacramental purposes. All

other intoxicating liquors, by the laws of your petitioner, are forbidden to be sold.

55 4. Petitioner further represents that in any event respecting any sale and delivery of intoxicating liquors made within her jurisdiction, the common carrier, carrying and delivering the same, is required to use good faith, due care and reasonable caution to ascertain that such intoxicating liquors are not to be received, possessed, sold or in any manner used by any person interested therein in violation of the laws of your petitioner.

5. Petitioner further represents that the plaintiff, the James Clark Distilling Company, made no effort whatsoever to ascertain the age, habits, or character of Floyd Rosier, the person named in the bill and who is alleged to have ordered the liquors in the bill mentioned from said plaintiff, the James Clark Distilling Company. And petitioner further represents that the plaintiff, the James Clark Distilling Company, made no effort whatsoever to ascertain or to inform itself of the purposes, lawful or otherwise, that said Rosier intended to exercise respecting the intoxicating liquors mentioned in the bill. And petitioner further represents that the plaintiff, the James Clark Distilling Company, has on and since the first day of July, 1914, been shipping intoxicating liquors into the State of West Virginia, particularly to citizens in said Sixteenth Judicial circuit aforesaid, which liquors were shipped into said State regardless of the purpose or use that the persons so receiving the same might make thereof. And petitioner further represents that the provisions of her prohibition statute are in exercise of her police powers for the protection of public health, peace and morals of her citizens and residents within her jurisdiction.

56 6. Petitioner denies that the plaintiff, the James Clark Distilling Company, is entitled to the mandatory injunction prayed for in its bill.

7. Your petitioner further most respectfully represents that in view of the allegations herein, that she should be permitted to intervene herein and be made a party to this cause, and she therefore prays that she may be permitted to file this petition and be made a party herein.

And your petitioner further prays that the plaintiff, the James Clark Distilling Company, may be denied the relief sought by its bill, and may your petitioner have all such other, further, general and special relief as the nature of her cause may require or to equity may appertain.

STATE OF WEST VIRGINIA,

A Body Politic and a Sovereign State,

By Her Counsel, FRED O. BLUE,

Counsel for the State of West Virginia.

57 STATE OF WEST VIRGINIA,

County of Kanawha, To wit:

Fred O. Blue, being duly sworn, says that he is State Commissioner of Prohibition of the State of West Virginia, the plaintiff named in the foregoing bill, and that he knows the contents thereof;

that the facts and allegations therein contained are true, except such as are therein stated upon information and belief, and that as to such allegations he believes them to be true.

FRED O. BLUE.

Taken, sworn to and subscribed before me, this 17th day of October, 1914.

My commission as Notary Public expires on the 26th day of April, 1923.

[NOTARY'S SEAL.]

FRANK LIVELY,
*Notary Public in and for the said
County and State Aforesaid.*

58-79 In the District Court of the United States for the District of Maryland, at Cumberland, Md.

In Equity.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,
vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

Upon the foregoing petition, exhibits and affidavit it is ordered by the District Court of the United States, for the District of Maryland, this 19th day of October, 1914, that said petitioner, The State of West Virginia, be permitted to file said petition and be made a party in the above entitled cause as prayed in said petition, provided no cause to the contrary be shown on or before the 29th day of October, 1914; a copy of said petition and this order shall be served forthwith by the Clerk upon the plaintiff herein or its counsel.

JOHN C. ROSE,
District Judge.

* * * * *

80 *Order of Court Making the State of West Virginia a Party
Defendant.*

Filed December 9, 1914.

In the District Court of the United States for the District of Maryland, at Cumberland.

In Equity.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,
vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

It appearing to the Court that no cause has been shown why the petitioner, the State of West Virginia should not be made a party in the above entitled cause, as prayed in its petition filed herein on

the 19th day of October, 1914, although due service of said petition and Order of Court passed thereon on the 19th day of October, 1914, was admitted,

It is thereupon ordered by the District Court of the United States for the District of Maryland, this 9 day of December, 1914, that said petitioner, The State of West Virginia, be, and it is hereby made a party defendant in the above entitled cause as prayed in said petition.

JOHN C. ROSE,
District Judge.

81 District Court of the United States District of Maryland, at
Cumberland, Maryland.

No. 2. Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, a Corporation, Com-
plainant,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation,
Defendant.

Transcript of Evidence.

GEORGE J. GOCKE, a witness of lawful age, produced by the plaintiff, being duly sworn and examined by Mr. Walter C. Capper, attorney for Plaintiff, stated that he was bookkeeper for the James Clark Distilling Company, plaintiff in this case, and he identified a paper dated Parsons, West Virginia, August 19, 1914, as being an order received by the James Clark Distilling Company at Cumberland, Maryland, through the United States mail from Floyd Rosier of Parsons, West Virginia. Thereupon the following occurred:

Q. Will you state what knowledge you had in reference to the uses that Rosier intended to put that alcohol to?

A. My knowledge of the order was he intended the alcohol for his own personal use.

(COURT:)

Q. This is an order for alcohol in the form of pure spirits, or is it alcohol in some other form?

A. It is 188% proof alcohol.

(COURT:)

Q. That is pretty near pure alcohol?

A. Yes, sir.

(COURT:)

Q. Whiskey is about 100% proof?

82 A. Yes, sir, or less.

Q. Pure grain alcohol, is it?

A. Yes, sir.

Q. Will you state whether or not the James Clark Distilling Company, or any of its agents, in any manner solicited any order from Mr. Rosier?

A. They certainly did not.

Q. And you say they had no knowledge whatever to what use he intended to put that shipment?

A. Other than his statement, that he intended to put it to his own use.

Q. How much alcohol does the order cover?

A. Four quarts—one gallon.

Q. And the price was?

A. Four dollars.

Q. Did the price accompany the order, and if so, in what way?

A. The money accompanied the order in the shape of a U. S. Postal Money Order.

Q. And that is exhibited here?

A. Yes, sir.

On Cross-examination by Mr. Benj. A. Richmond, attorney for the Western Maryland Railway Company, defendant, witness stated that Mr. Rosier stated that he wanted the alcohol for his personal use, but that witness had no knowledge as to what way he was going to personally use it. Outside of a use for mechanical purposes, witness would not use it for any purpose except rubbing, because it is not fit to drink, being too strong. The order speaks of 188% proof,

83 which is the percentage or strength of the alcohol. It would have an intoxicating influence if a man should drink it.

The James Clark Distilling Company did not know Rosier before he sent this order in and witness did not know whether that company had had business dealings with him before. Rosier sent the order on a plain piece of paper and witness did not know how Rosier got the address of the plaintiff firm. That firm did not employ any traveling salesmen to solicit business in that part of the country. The plaintiff tried to ship the order by American Express and they refused to ship it; they then tried to ship it by railroad and they refused it.

On further cross-examination by Mr. John Phillip Hill, attorney for American Express Company, witness stated that he understood that pure grain alcohol is used to increase the strength of certain intoxicating beverages. At the time this order was received the plaintiff company did not publish advertisements in newspapers, but had published such advertisements, possibly a month or two months before. Witness could not say whether this order was the result of some such advertisement previously published. After the first of July, 1914, plaintiff company did not publish any advertisements in West Virginia. Witness did not know how Mr. Rosier knew that the price of the alcohol was \$1.00 a quart; that Rosier may have given previous orders. Witness did not have any knowledge that Rosier intended the alcohol for his own personal use except what Rosier stated in his letter.

Thereupon Mr. Fred O. Blue, State Commissioner of Prohibition

of the State of West Virginia moved to be made a party defendant in each case, which motion was granted and Mr. Blue proceeded to further cross-examine the witness. On such cross-examination the witness stated that the general business of the James Clark Distilling Company is the distillation and sale of whiskey. That company does not manufacture alcohol but only rye and malt whiskey. Does not sell any beer, but sells quite a lot of the alcohol such as was ordered by Rosier. Since the first of July, 1914, that company has sent written or printed circulars into the State of West Virginia to solicit business, but not to any great extent. Witness could not say whether any of these circulars had been sent into Tucker County or whether Rosier had received any of them. These order blanks and solicitations gave the prices of all the different grades of liquor and alcohol sold by the plaintiff company. Witness does not know whether any such order blanks sent into West Virginia since the first of July came back to the company with orders. Witness believes that the kind of alcohol mentioned in Rosier's order could be diluted and used as a beverage, but does not know whether in fact it is so used. Witness cannot state whether any other shipments were made after the first of July to Rosier, or the amount of liquors that the plaintiff company has shipped into the State of West Virginia since the first of July.

85 JOHN KEATING, a witness of lawful age, produced by the plaintiff, being duly sworn was examined by Mr. Walter C. Capper, as follows:

He is Vice-President and Treasurer of the James Clark Distilling Company which is engaged in the distilling and wholesale and retail liquor business. Witness had no knowledge of the order of Floyd Rosier except that it came in regular mail order business, and as that business is a cash business it does not become part of the company's record, and witness cannot say whether that company had made any previous shipments to Rosier or ever received any other order for him. Alcohol of the kind covered by the order is used for rubbing purposes and also for drinking, by mixing a gallon of such alcohol with a gallon of water. Sometimes they put it on a stove and put sugar in it, so they get whiskey for fifty cents a quart. That is to say they get it rectified instead of pure neutral spirits. They buy a gallon of alcohol and reduce it and so get alcohol rectified, but without the whiskey flavor. Witness does not know whether the firm solicited this order, unless it came in from advertising which had been carried on for forty years. The James Clark Distilling Company having been in business for forty years and having advertised for mail order business for thirty years. The company is a Maryland corporation with its principal office located in Cumberland. Since the first of July the company had been carrying on its regular mail order advertising in West Virginia. The custom of the company is to send out between fifty and one hundred thousand circulars every year. They get the names from the Clerks of the Courts of the various counties showing registered voters of their county, with the post office addresses, and also purchase names from

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companies that make it a business of going from court to court and getting the names.

Cross-examination by Mr. BENJ. A. RICHMOND, Attorney for Western Maryland Railway Company:

The one hundred thousand circulars of which witness spoke of as having been sent out during a year were not sent to West Virginia alone, but also to Maryland, Virginia and Pennsylvania. The circulars sent to points in West Virginia since the first of July, 1914, are the same as circulars sent to the same points prior to July 1, 1914. The company does not make beer, but manufactures spirituous liquors and also buys spirituous liquors. The sale of alcohol forms quite a large part of the company's usual business. Witness had never heard of Rosier before receiving this order marked for his personal use. Witness did not know what he really wanted to use it for, he may have wanted it to drink and he may have wanted it to rub himself with. Such alcohol is also used for the purpose of fortifying beers or wines. Plaintiff company attempted to ship the liquor by American Express but they refused to accept it and they then applied to Western Maryland Railway Company which also refused to accept it. Application was made to the Agent of the Railway Company and also to the Superintendent by the transferman of the plaintiff company. Witness understood that the defendant companies gave as a reason that they would not accept the shipment that an injunction had been issued against them. The James Clark Distilling Company has a branch house in Washington, and did have one at Parkersburg, West Virginia, until June 30, 1913. It manufactures liquors just outside of Cumberland.

87 The company's mail order business had been going on for thirty years. The order from Rosier was accompanied by a post office money order to pay for the shipment. Witness does not know how Rosier came to know that four quarts of alcohol would cost four dollars, unless he got it from one of the company's circulars. Witness could not state any manner in which the Western Maryland agent at Cumberland or at Baltimore, when applied to to ship liquors could ascertain whether the order for the liquor was given upon solicitation by the plaintiff company. If the railway company were required to ascertain whether Rosier wanted this liquor for his personal use, or whether he had ordered it on solicitation, witness does not know how they could do so. Witness stated that when a man says on the order that he wants it for his personal use "That is the only knowledge we have". In answer to a question by the Court, witness stated that the James Clark Distilling Company had not sent any circulars into West Virginia since the first of July advising applicants that the company would be unable to ship orders unless wanted for their personal use. The company until within thirty days of the trial had never kept the names of customers from whom orders were received. Names had always been obtained from the Clerks of the Courts and the company kept no list.

On cross-examination by Mr. John Philip Hill, attorney for American Express Company, witness stated and it was admitted by

plaintiff that the shipment was offered to American Express Company and refused because of an injunction against it, copy of said injunction being filed as an exhibit with the answer of the
88 American Express Company that said injunction was duly served on the express company prior to its refusal to accept the package. The same admission was also made in respect to the Western Maryland Railway Company.

On further cross-examination by Mr. FRED O. BLUE, witness testified as follows:

Q. Upon direct examination you were asked as to what uses the consignee might make of this alcohol he ordered. Don't you know that also up in that country that alcohol being diluted could be used for speak-easy purposes?

A. That might be true. I have never been to one of their speak-easy-s, and I don't know what they use it for.

Q. In other words, while alcohol might be used for lawful purposes by Rosier, he also might use it for unlawful purposes?

A. Yes, I suppose he could.

Q. In view of that fact, when you received this order from a man unknown to you, did you seek to inform yourself as to what kind of a man he was, and the purposes to which he might put the alcohol?

A. We had no interest in Mr. Rosier. He was twenty-one years of age, and I have seen people drinking pure alcohol in West Virginia twenty-five years ago.

(COURT:)

Q. I presume you didn't know whether he was twenty-one or not?

A. We never get anything but a list of registered voters.

89 (COURT:)

Q. Was he on the list?

A. I don't know whether he was or not.

Q. You didn't know when you accepted this order whether Rosier was a minor or a man of full age?

A. No, we did not, and we didn't know whether he was a minor or not. If we had known he was a minor, we wouldn't have shipped it.

Q. Did you know whether he was a man of intemperate habits?

A. No.

Q. Did you know whether he was a man given to the use of narcotic drugs?

A. We didn't know anything about the man.

Q. Did you seek to ascertain these facts from this stranger, whether he was a man of intemperate habits or given to the use of narcotic drugs, or was a minor?

A. I don't think it is required of us to find out from a man his general reputation.

(Court instructs witness to answer the question.)

Q. (Question repeated by stenographer.)

A. No.

Q. Are the circulars or were the circulars you sent into West Virginia printed ones of a general kind?

A. Yes, sir.

Q. Do you yet have some of those same printed circulars, the same kind that you sent into West Virginia since July 1, 1914?

A. That is, if any was sent.

90 Q. Upon your direct examination, you stated you had sent circulars into West Virginia, and I believe since the first of July, 1914?

A. I don't know whether we have since the first of July, but I guess we have; we have that business going on all the time.

Q. I will ask you to state whether or not you did send circulars and order blanks into West Virginia since the first of July, 1914?

A. I suppose we did. Personally, I couldn't say. I didn't see the circulars enclosed, and I didn't address them and didn't mail them.

Q. Who is connected with your Company who could tell us that?

A. I think I am safe in saying we did.

Q. Can you produce for the purposes of the Court and counsel, and make a part of this record some of the same kind of printed circulars and some of the blanks that you sent into West Virginia since the first of July, 1914?

A. I think so.

Q. Will you do so?

A. If our counsel requires it and wishes it.

(Papers produced—papers and blanks asked for produced by the witness.)

(COURT:)

Q. What is the reason on the back of this circular you have printed, "We put up whiskey in barrels and half barrels with or without labels at customer's option?"

91 A. Before the Prohibition law went into effect, in local option counties we had quite a business in whiskey put up in barrels and half barrels, and they took out a Government license, and have it bottled under a hundred different brands.

(COURT:)

Q. And if it was an honest man, he would prefer that the barrel be labeled?

A. Yes, sir, not the barrels, but the bottles; we had to brand the barrels on the outside.

Q. Since the first of July, your Company has been shipping whiskey into the State of West Virginia?

A. Yes, sir.

Q. The same as before?

A. Yes, sir.

Q. You made no effort to ascertain the character and ages and habits of the persons who ordered it, nor the purposes to which they intended to put the liquor, did you?

A. No, I don't think we have. I will produce circulars to show

that the man must state he is twenty-one years of age, and wanted it for his personal use.

Q. When did you get those?

A. I don't know whether any of them are out or not. They are in the hands of the printer.

Q. Were any notices published by you in the papers of West Virginia, that the applicant will have to be twenty-one years of age, and that the liquor is for his own use?

A. We have not, but we are getting the circulars up as fast as possible, and will have printed under the man's name that
92 "I am twenty-one years of age, and this is for my personal use."

(COURT:)

Q. You haven't sent those out yet?

A. I don't think so; I am not sure.

Q. If your Company received an order for as much as a barrel of whiskey from West Virginia, would you have shipped it without making inquiry, as to what the person ordering it intended to make of that liquor?

A. I think we would.

Q. You would have shipped it then?

A. Yes, sir.

Q. Without making inquiry?

A. Yes, sir.

Q. You have been shipping into the counties of West Virginia a great deal of liquors since the first of July?

A. Yes, sir.

Q. In large and small quantities?

A. Not very large quantities; the quantities have been small since the first of July.

On further cross-examination by Mr. John Phillip Hill, attorney for American Express Company, witness stated that at the time this shipment was offered to American Express Company, witness did not believe that that company had any more knowledge of the order for the alcohol or the person who made it than the witness himself had.

93 Mr. STANTON ENNES, called as a witness for defendants being first duly sworn and examined by Mr. Benj. A. Richmond, attorney for defendant, The Western Maryland Railway Company stated that he was General Superintendent of that company with headquarters at Hagerstown. Beginning at Cumberland that company has on its line extending from Cumberland, Maryland, into the State of West Virginia regular stations and agents at the following points; Keyser, Westernport, Luke, West Virginia Central Junction, Shaw, Blaine, Potomac Manor, Harrison, Elk Garden, Schell, Gorman, Bayard, Dobbin, Henry, Thomas, Douglas, Hendricks, Davis, Hambleton, Parsons, Montrose, Elkins, Belington, Durbin, Beverly, Mill Creek and Huttonsville. Parsons is in Tucker County, West Virginia; from Tucker County to Cumberland the road runs

through Grant and Mineral Counties. The company has a number of stations in the State of Pennsylvania where it receives shipments in Franklin, Adams, Fayette and Somerset Counties, and also quite a number of stops in Maryland where it receives shipments, such as Westminster, Hagerstown and Cumberland. Witness has read the terms and requirements of the injunctions granted by Judge Reynolds of Keyser and thinks it is physically impracticable for the company in the shipments of liquors to observe the terms of the injunction. When witness first saw the injunction—and in an effort to comply with it he thought that in doing business with an old reliable house like the plaintiff in this case the railroad company might accept the statement of the shipper that so far as solicitation was concerned the shipper had complied with the law. But it occurred to witness

that if the shipper had advertised in a Cumberland paper or
94 some outside paper and these papers were carried into West Virginia that that would be a solicitation, and that further when it came to doing business with a man not so well established as plaintiff in this case the railroad company was absolutely helpless in determining whether the sale had been solicited or not, and when it came to ascertaining whether the receiver of the goods was going to use them in violation of the West Virginia law, witness thought it impossible to comply with the terms of the injunction. The rate on the shipment to Parsons, West Virginia would have been thirty cents and it would mean that at all stations in West Virginia the railroad company would have to take means to carry out these instructions, and witness did not see how the company could do it in a commercial way, taking into consideration the rates. Witness supposed the company in order to comply with the terms of the injunction would have to maintain someone to determine who the receiver was and what use he was going to make of the liquor. Witness gave the thing up as impracticable and instructions were given that the company could not comply with the law, (the injunction). The difficulty would be applicable at all stations in Maryland and Pennsylvania, where the company received goods. The company has not a sufficient force of detectives at stations in these three states to determine these questions and the costs of maintaining such a force would run into prohibitive figures.

Cross-examination by Mr. LAWRENCE MAXWELL, attorney for plaintiff:

Witness issued a verbal order against the reception of interstate liquor into West Virginia; this order absolutely forbade the receipt of any interstate shipment of liquor into Grant, Tucker and Mineral Counties. It was issued a day or two after notice of the in-
95 junction and included all liquor delivered to the railroad company by a shipper or a connecting carrier. It was an absolute refusal to carry interstate shipments of liquor into those counties without regard to the quantity or any other condition or circumstance. The injunction was dated August 11th and this order was issued a day or two after the injunction. The witness has no knowledge that the company knew that the injunction was awarded.

Does not know whether it was awarded ex parte or not. The company took no steps to have the injunction modified or vacated. Mr. Richmond as counsel for the company under authority of the witness ordered the shipments stopped.

96 WALTER A. YINGLING, a witness for defendants, being examined by Mr. Benj. A. Richmond, testified that he was freight agent at Cumberland for defendant, The Western Maryland Railway Company, and that after the injunction in Tucker County had been served he received instructions from Mr. Richmond, as counsel for that railway company not to ship any liquor into Grant, Tucker and Mineral Counties, West Virginia, and that none had been shipped. The railway company carries liquor for personal use into other counties in West Virginia from Cumberland when the order states that the liquor is for personal use and there is "nothing suspicious about it". Witness remembers the gallon of alcohol involved in this case being brought into his office for shipment sometime after August 14th, after the injunction had been served and after witness had received the instructions above noted. The shipment was brought to the railway company's freight office by Hirshman's transfer, and was accompanied by three or four gentlemen who wanted the witness to accept it for shipment to Parsons in Tucker County, West Virginia. Witness did not accept the shipment and gave as his reason for not accepting it that he had instructions from his Superintendent through General Counsel for the company, that on account of the injunction issued by Judge Reynolds the railway company was prohibited from accepting any liquor shipments for Grant, Tucker and Mineral Counties. But for these orders and the injunction, witness probably would have accepted the shipment. There was nothing suspicious about the shipment or the order; on the face of it it looked like a bona fide order. One of the gentlemen stated that he had offered the shipment to the Traffic Agent, Mr. Getty, and also to the Superintendent, Mr. Steiner of the Railway Company.

97 On cross-examination by Mr. Capper, counsel for plaintiff, witness stated that he refused the shipment solely because he had received orders from his superiors to receive no shipments of liquor for those three counties; that the plaintiff showed him the order and if he had been free to act would not have regarded this shipment as presenting anything suspicious.

Thereupon defendant, American Express Company offered in evidence Exhibit No. 1 filed with its answer. Thereupon the following occurred:

Mr. MAXWELL (Counsel for plaintiff): "You admit that your Company has made no effort to dissolve the injunction, and that the injunction was issued ex parte"?

Mr. BLUE (Representing the State of West Virginia): "It was issued as a preliminary injunction and no steps taken by the Defendant in either case."

Mr. RICHMOND (Counsel for Western Md. Railway Co.): "The Western Maryland has not entered an appearance in Tucker County,

I don't think. They have made no motion to dissolve the injunction."

Mr. MAXWELL: "Filed no answer?"

Mr. RICHMOND: "Filed no answer, and just stopped right there and obeyed the order."

Mr. MAXWELL: "The same is true of the American Express Company?"

Mr. HILL (Counsel for defendant, American Express Co.): "Yes, sir."

Mr. MAXWELL: "And you refused to ship, absolutely refused to ship?"

98 Mr. HILL: "Yes sir."

The foregoing transcript of evidence condensed and reduced to narrative form by counsel for plaintiff, examined and approved this 8th day of February, 1915.

FRED O. BLUE,

Counsel for the State of West Virginia.

The foregoing transcript of evidence condensed and reduced to narrative form by counsel for plaintiff, examined and approved this 10th day of February, 1915.

BENJ. A. RICHMOND,

Counsel for The Western Maryland Railway Company.

The foregoing transcript of evidence condensed and reduced to narrative form by counsel for plaintiff, examined and approved this 11th day of February, 1915.

JOHN PHILIP HILL,

Counsel for American Express Company.

Approved Feb. 11", 1915.

JOHN C. ROSE,

U. S. District Judge.

99 PLAINTIFF'S EXHIBIT No. 1.—JOHN KEATING.

Filed September 30, 1914.

Report.

On results of examination of a sample of "Braddock" Rye Whiskey received from The James Clark Distilling Co. of Cumberland, Md. The sample contains 46.7 per cent. of alcohol by weight.

"It leaves on evaporation a fixed residue representing 102. grains per wine gallon, of which 4.1 grains is mineral matter. The acid present is equivalent to 11 per cent. counted as acetic acid. Amylic alcohol is present to the extent of a mere trace only. Tannin in minute amount and a little of a caramel like or "extraction" substance, are present—also others in minute quantity. No sulphates. No heavy metals, such as copper, lead or zinc. The sample appears to be a sound, genuine whiskey, free from deleterious foreign substances and free to a more than usual extent from amylic alcohol."

J. H. MALLET.

(Here follow fac-simile circulars and labels marked pages 100 to 104.)

CHARTS

TOO

LARGE

FOR

FILMING

05

Opinion of the Court.

Filed December 18, 1914.

In the District Court of the United States for the District of
Maryland.

THE JAMES CLARK DISTILLING COMPANY OF CUMBERLAND, MD.,
a Corporation,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

ROSE, District Judge:

Both the plaintiff and the defendant are Maryland corporations. The interposition of this court is invoked for the protection of rights said to be given by the Constitution and laws of the United States. The defendant operates a railroad between Cumberland, Maryland, and various stations in the counties of Mineral, Grant and Tucker, West Virginia, among them being the town of Parsons. On July 1, 1914, there went into effect an act of the legislature of the latter State commonly known as the Yost law. It prohibits, except for medicinal, pharmaceutical, scientific, mechanical or sacramental purposes, the manufacture, sale or offer for sale of intoxicants and the soliciting or receiving of orders for them. It contains many provisions intended to make evasion difficult and dangerous. Penalties are imposed on those who by themselves or in association with others maintain any club-house or other place in which liquor is received or kept for the purpose of use, gift, barter or sale as a beverage, or for distribution or division among the members of any club or association. Section 8 provides in part that—

106 "If any person shall advertise or give notice by signs, bill board, newspapers, periodicals or otherwise * * * of the sale or keeping for sale of liquors, or shall circulate or distribute any price lists, circulars or order blanks advertising liquors, or publish any newspaper, magazine, periodical or other written or printed papers, in which such advertisements or notices are given, or shall permit any such notices, or any advertisement of liquors (including bill boards) to be posted upon his premises, or premises under his control, or shall permit the same to so remain upon such premises, shall be guilty of a misdemeanor."

Another section requires common carriers to keep books in which shall be entered the name of every person to whom liquors are shipped and the amount and kind thereof, together with the date of delivery and by and to whom delivered. Every consignee must in person sign his name to such record.

Within a few weeks after the act went into effect the State thought it had reason to believe that systematic attempts to evade its provisions were being made by various residents of the counties named. It accordingly, as authorized by law, sought the aid of its Circuit Court having jurisdiction in them. It filed a bill against the com-

pany, which is the defendant in this cause. It alleged various facts which strongly tended to show that the defendant was delivering great quantities of liquor to many different persons in the town of Thomas and its neighborhood, and that a number of these shipments were of such quantities as to make it highly improbable that they could have been intended solely for the personal use of the consignees. It charged that much of this liquor had been shipped to boarding bosses and other persons to be, in violation of law, by them distributed to their boarders or associates. It said that the defendant was accepting shipments and making deliveries of liquor without exercising due care to ascertain that they were not intended to be used in violation of its laws. In accordance with the prayer

of this bill an ex parte injunction was issued which, among other things, enjoined the defendant from accepting for transportation or delivery to anyone in the three counties in question any liquors unless it had first ascertained "by acting in good faith with due diligence and caution, that such liquors were ordered by the consignees for their lawful personal use without solicitation on the part of the consignors, and that such liquors were offered by the consignors for acceptance and delivery thereat by the said defendant to the consignees for their lawful personal use without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said State." It was further enjoined from delivering any person in the counties named any liquors procured by the consignee, by him and those associated with him "to be received, kept for the purpose of use or gift as a beverage or for distribution or division among himself and those associating with him, at a place which is kept or maintained by himself or by associating with others, or which he by himself or by association with others in any manner aids, assists or abets in keeping or maintaining." The decree, moreover, prohibited delivery to any person "unless the consignee signs the defendant's liquor record in his own proper person and not in the name of some fictitious person, or otherwise, and then only when the consignee has ordered the same for his personal lawful use with no intention that the liquor so delivered is to be received, possessed, sold or in any manner used in said State of West Virginia in violation of any law thereof."

So soon as this injunction was served upon the defendant it determined to refuse, and thereafter did refuse, to receive any shipments of liquor for transportation to any station in those counties.

It says that if it attempted, before accepting such shipments or before making such deliveries, to obtain the information required by the order of the West Virginia court, it would be compelled to employ an army of detectives and investigators which would cost it far more than the gross freight it would receive for the transportation of the merchandise in question.

The plaintiff is a liquor dealer in Cumberland. It has a large and profitable trade in the portion of West Virginia included within those counties. It is also one of the concerns which the State of West Virginia in its bill of complaint in its own court speci-

mentioned as shipping liquors in large quantities to the town of Thomas and its neighborhood. Both before and after the going into effect of the Yost act it has through the mails systematically distributed price-lists and solicited orders from residents of that part of the State. With its price-lists and soliciting circulars it sent out order blanks to be filled up and signed by prospective purchasers. In these blanks there is a clause stating that the liquor is intended for the personal use of the individual giving the order.

In August, 1914, one Floyd Rosier, a resident of the town of Parsons, by one of these order blanks directed the shipment to him by the plaintiff of four quarts of alcohol and sent a post-office money order for Four Dollars in payment therefor. The plaintiff packed the goods for shipment and tendered them to the defendant for transportation. In accordance with the determination, at which, as before stated, it had arrived, the defendant refused to receive or transport the package and announced that it would refuse to accept any intoxicants for delivery in the territory in which the injunction was operative. The plaintiff thereupon instituted these proceedings. It seeks a mandatory injunction to compel the
109 defendant to transport all liquors ordered, without plaintiff's solicitation, by Rosier and other customers for their own personal use. At its request, and with the consent of all parties, the State of West Virginia has been made a party to the suit.

Only two questions in this case interest the defendant. It fears that it may be commanded to do something for the doing of which the State court will punish it, and it objects to spending a large sum of money to keep other people from evading the liquor laws of West Virginia.

The voluntary appearance of the State disposes of the former. It was the plaintiff in its own courts. It alone can complain of any disobedience of the decree there passed. It has come into this proceeding and will be bound by whatever is properly done herein.

The expenses to which the defendant may lawfully be put in connection with the shipment and delivery of intoxicants in West Virginia depends upon the degree of care which it may be required to exercise to prevent others using its facilities to break the laws of the State. The controversy between the plaintiff and the State is more far reaching and will be first passed upon.

At the hearing the counsel for the State argued, first, that any shipment into West Virginia by a seller to a buyer of intoxicants was prohibited. Second, that even if that was not so any such shipment was forbidden if the seller had by mail or otherwise solicited the order for it. The first contention was based upon the construction which the State put upon a clause of section 3 of the act, which reads—

"In case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee."

110 The sale of intoxicants in West Virginia is prohibited. Liquor which a resident of West Virginia orders from out of the State is usually delivered to him by a common carrier. If he has bought it the State says that the law declares that the sale has taken place in the county in which he lives.

Such an interpretation of the statute cannot be accepted. The provision quoted does not make illegal anything not otherwise forbidden. All that it does or was intended to do was to make certain the county in which those who had offended against its other provisions should be prosecuted. The State could not forbid the sale of liquors in Maryland, nor could it say that what by the general law was a completed sale in Maryland should be held to have been made in West Virginia.

American Express Co. v. Iowa, 196 U. S., 133.

If it had wished to keep citizens of West Virginia from obtaining liquor even for their own personal use from outside the State, and had the constitutional right to do so, it might have made it an offense for anyone to order them or to receive or have them. There is nothing in the act, however, to indicate that the State had any objection to anyone obtaining liquor for his own personal use provided he can do so otherwise, than by, within the State, buying or making it.

It follows that liquor brought into West Virginia for the exclusive personal use of the consignee is not intended by anyone interested therein to be received, possessed or used in violation of any law of that State.

Does the fact that such order has been solicited through the mails by a non-resident dealer in liquors make the transaction, which would otherwise have been lawful, illegal? One may solicit
111 in writing as well as by word of mouth. Such a solicitation is made at the place at which in pursuance of the intent of the person making it the written communication is delivered to the person solicited.

United States v. Thayer, 209 U. S., 39.

That the letter is mailed in another State from that at which it is to be delivered does not necessarily prevent the latter state from punishing the sender if it can catch him.

In re Palliser, 136 U. S., 257.

It may be that the right to inflict punishment in such cases may be exercised only when the letter is sent in furtherance of something which the common moral sense of mankind regards as criminal, and does not exist when the thing, aided by the letter, would be in itself indifferent had it not been made criminal by local legislation.

Adams v. The People, 1 N. Y., 175.

Into these niceties it is unnecessary to go. Judge Keller has held that the Yost act reasonably construed does not attempt to prohibit

the solicitation of liquor orders by means of communications mailed from without the State.

West Virginia v. Adams Express Co. et al. (as yet unreported).

It seems only fair to presume that if the legislature had wished to deal with that phase of the problem it would have used language which would have made its purpose plain. I therefore agree that the West Virginia law has not attempted to prohibit such method of soliciting. Whether it has a constitutional right to do so if it chooses need not be here decided and I intimate no opinion as to it.

The Federal courts are, of course, bound by the construction which those of the State put upon its own statutes. I do not understand, however, that such rule requires national tribunals to accept the issue by a State court of first instance of an injunction
112 upon an ex parte application as an authoritative construction of the applicable State legislation.

The defendant in this case makes no objection to the requirement that it shall keep certain kinds of delivery books. It is consequently unnecessary to inquire whether the somewhat narrow construction put upon the Webb-Kenyon act by a number of State courts of last resort, in such cases as *Adams Express Co. v. Commonwealth*, 157 S. W., 908, *Palmer v. Southern Express Co.*, 165 S. W., 236, *Van Winkle v. State*, 91 Atl., 385, or that in effect given to it by Judge Bean in *United States v. Oregon Washington Rail Navigation Co.*, 210 Fed., 378, is the sounder interpretation of the intention of the Congress which passed it. It would be even more beside the mark to pass upon the soundness of plaintiff's contention that a State cannot validly prohibit the possession by an individual of intoxicants for his own personal use. A number of courts of high rank have so held.

State v. Gilman, 33 W. Va., 146;

Commonwealth v. Campbell, 133 Ky., 50;

Eidge v. City of Bessemer, 164 Ala., 599.

On the other hand, it is clearly settled that he may be constitutionally prohibited from either buying or making it within the State. As every State in the Union has the like right, and as it is at least possible that Congress may validly prohibit its importation from abroad, the right, if it exists, may be lawfully made almost impossible of exercise.

In this case nothing need be decided other than that the defendant as a common carrier is bound to receive for shipment, and to transport and deliver in West Virginia, such liquors as are intended solely for the personal use of the consignee, even though the orders for them had been solicited by letters mailed at points outside the State. It has no right to accept for shipment, or to deliver

113 in West Virginia, liquors which are intended by any person interested therein to be used in any way forbidden by the law of that State. It is not bound at its peril to make sure that no liquor transported by it is intended to be used contrary to the State

law. It need not create or maintain any special staff of investigators or detectives to aid it in determining such questions. It must, however, act in good faith. Its agents and employees who handle such shipments for it must keep their eyes open and must exercise common sense to prevent it and its instrumentalities being used as aids in violation of the law.

A decree may be drawn in accordance with the conclusions herein stated.

114

Decree.

Filed December 24, 1914.

In the District Court of the United States for the District of Maryland, at Cumberland, Maryland.

No. 2, Equity Docket.

THE JAMES CLARK DISTILLING COMPANY OF CUMBERLAND, MD.,
a Corporation,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

This cause came on to be heard at the September Term of this Court, held in Cumberland, Maryland, upon the bill of complaint, the answer of the defendant, The Western Maryland Railway Company, and the petition of the State of West Virginia, a body politic and a sovereign State, to be made a party defendant herein, and the order of this Court making the said State of West Virginia a party defendant, and the testimony and proofs in the case, and was argued by Counsel.

It is thereupon, upon consideration of the same for reasons stated in written opinion which opinion is now here filed and made part of the record, this 24 day of December, 1914, ordered, adjudged and decreed by the United States District Court for the District of Maryland, that The Western Maryland Railway Company, a corporation, defendant herein, its agents, servants, employees and officers, and each of them, be and they are hereby commanded and enjoined to cease refusing to accept for transportation over its railway line in due course of business from Cumberland, Maryland, to points of delivery

115 in the Counties of Mineral, Grant and Tucker, in the State of West Virginia, any and all liquors as set forth and described in the bill of complaint, ordered by Floyd Rosier or other customers of The James Clark Distilling Company, plaintiff herein, residing and being in said Counties of West Virginia, for their own personal use, whether or not said orders of said customers have been solicited by the plaintiff by means of advertisements, price-lists, letters or circulars, sent from places outside of the State of West Virginia, to such customers by the plaintiff in the United States mails; and said defendant, its agents, servants, employees and officers, be and they are hereby perpetually enjoined and commanded to accept

from the plaintiff as aforesaid, all such liquors presented to them by the plaintiff for shipment over its said line of railway from Cumberland, Maryland, to points in said Counties of Mineral, Grant and Tucker, in the State of West Virginia, and to transport and carry the same in interstate commerce from Cumberland, in the State of Maryland, to all such points on its railway line in said Counties of Mineral, Grant and Tucker, in the State of West Virginia, where the defendant maintains a permanent station with a regular agent for the receiving and delivery of merchandise, and for the keeping of a record of the same, as required by the law of the State of West Virginia; and said defendant, its agents, servants, employees and officers, be and they are hereby perpetually commanded to deliver all such liquors presented to it by the plaintiff at Cumberland, over its railway line at said points in said three Counties of West Virginia, as aforesaid, to the consignees thereof.

Provided, however, that before the said defendant, The Western Maryland Railway Company, its servants, agents, employees and officers, shall receive at Cumberland, Maryland, for transportation and delivery in interstate commerce to any of said points in said three Counties, in the State of West Virginia, any such aforesaid shipments of liquors to consignees in said three Counties ordering the same, the said defendant, its servants, agents, employees and officers, shall in good faith and as far as they are reasonably able so to do, ascertain from the shippers of said liquors whether the same are for the personal use of the consignee, or whether they are intended to be used by the consignees for the purpose of selling or giving away, or dividing the same with anyone else who may have an interest therein, or whether said liquors in any way are intended to be used by the consignees, or any person interested therein, in any way in violation of the laws of the State of West Virginia; and shall exercise the same due care in regard to the delivery of the same to any such consignees, and in all things shall carefully scrutinize said shipments of liquor and exercise their common sense to prevent said railway and its facilities from being used in any way as an aid in the shipment of said liquors in violation of the Prohibition Laws of the State of West Virginia; and in case the defendant, its agents, servants, employees and officers, shall be satisfied as aforesaid, that any of said shipments of liquor are not intended for the personal use of the consignee, or are to be used by him or her in any manner in violation of the laws of West Virginia, then said defendant, its agents, servants, employees and officers shall refuse to accept or deliver the same, as the case may be.

JOHN C. ROSE,
District Judge.

117

Perpetual Injunction.

Issued December 24, 1914.

THE UNITED STATES OF AMERICA,
District of Maryland, To wit:

The President of the United States of America to The Western Maryland Railway Company, a corporation:

Whereas, The James Clark Distilling Company, a corporation, duly organized and existing under the laws of the State of Maryland, and a citizen of said State and of the United States filed its Bill of Complaint against you, as defendant, in the District Court of the United States for the District of Maryland, at Cumberland, Maryland, on the 24th day of August, 1914, praying among other things for an injunction perpetually commanding and enjoining the defendant, its servants, agents, employees and officers, and each of them to cease refusing to accept for transportation over its railway line in due course of business, from Cumberland, to points of delivery in the Counties of Mineral, Grant and Tucker, State of West Virginia, all liquors ordered by Floyd Rosier or other customers of The James Clark Distilling Company, for their own personal use, and without solicitation on the part of The James Clark Distilling Company, as more particularly set forth in said Bill of Complaint;

And whereas the said District Court hath, this 24th day of December, 1914, granted an injunction commanding and enjoining you as hereinafter set forth,

You, your agents, servants, employees and officers and each of them are therefore commanded and enjoined to cease refusing to accept for transportation over *its* railway line in due course
118 of business from Cumberland, Maryland, to points of delivery in the Counties of Mineral, Grant and Tucker, in the State of West Virginia, any and all liquors as set forth and described in the bill of complaint, ordered by Floyd Rosier or other customers of The James Clark Distilling Company, plaintiff aforesaid, residing and being in said Counties of West Virginia, for their own personal use, whether or not said orders of said customers have been solicited by the plaintiff by means of advertisements, price-lists, letters or circulars, sent from places outside of the State of West Virginia to such customers by the plaintiff in the United States mails; and said defendant, its agents, servants, employees and officers, be and they are hereby perpetually enjoined and commanded to accept from the plaintiff as aforesaid, all such liquors presented to them by the plaintiff for shipment over its said line of railway from Cumberland, Maryland, to points in said Counties of Mineral, Grant and Tucker, in the State of West Virginia, and to transport and carry the same in interstate commerce from Cumberland, in the State of Maryland, to all such points on its railway in said Counties of Mineral, Grant and Tucker, in the State of West Virginia, where the defendant maintains a permanent station with a regular agent for the receiving and

delivery of merchandise and for the keeping of a record of the same, as required by the laws of the State of West Virginia; and said defendant, its agents, servants, employees and officers, be and they are hereby perpetually commanded to deliver all such liquors presented to it by the plaintiff at Cumberland, over its railway lie at said points in said three Counties of West Virginia, as aforesaid, to the consignees thereof, provided, however, that before the said defendant, The Western Maryland Railway Company, its servants agents, employees and officers, shall receive at Cumberland, Maryland, for transportation and delivery in interstate commerce to any of said points in said three Counties, in the State of West Virginia, any such aforesaid shipments of liquors to consignees in said three Counties ordering the same, the said defendant, its servants, agents, employees and officers, shall in good faith and as far as they are reasonably able so to do, ascertain from the shippers of said liquors, whether the same are for the personal use of the consignee, or whether they are intended to be used by the consignees for the purpose of selling or giving away, or dividing the same with anyone else who may have an interest therein, or whether said liquors in any way are intended to be used by the consignees, or any person interested therein, in any way in violation of the laws of the State of West Virginia; and shall exercise the same due care in regard to the delivery of the same to any such consignees, and in all things carefully scrutinize said shipments of liquor and exercise their common sense to prevent said railway and its facilities from being used in any way as an aid in the shipment of said liquors in violation of the Prohibition Laws of the State of West Virginia; and in case the defendant, its agents, servants, employees and officers, shall be satisfied as aforesaid, that any of said shipments of liquor are not intended for the personal use of the consignee, or are to be used by him or her in any manner in violation of the laws of West Virginia, then said defendant, its agents, servants, employees and officers shall refuse to accept or deliver the same, as the case may be, under the pains and penalties that may fall thereon. Hereof fail not at your peril.

120 Witness the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland, the 24th day of December, 1914.

Issued the 24th day of December, 1914.

[SEAL OF COURT.]

ARTHUR L. SPAMER,
Clerk of our Said District Court.

Marshal's Return Endorsed on Above Injunction.

Served the within Perpetual Injunction on the Western Maryland Railway Company, by service on L. F. Timmerman, its Sect'y & Treas., by handing him an attested copy of the same, at Baltimore, Maryland, December 24, 1914.

GEORGE W. PADGETT,
U. S. Marshal.

121

Order of Court Directing a Re-argument.

Filed January 15, 1915.

In the District Court of the United States for the District of
Maryland.

In Equity.

THE JAMES CLARK DISTILLING COMPANY OF CUMBERLAND, Md.,
a Corporation,
vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

The Court of its own motion having come to the conclusion that there is probable error in the decree entered in the above entitled cause on the 24th day of December, 1914, hereby this 15th day of January, 1915, orders a re-argument of said matter to be held on Wednesday, January 20th, 1915, at 10 o'clock A. M., in the United States District Court Room, at Baltimore, Maryland.

JOHN C. ROSE,
District Judge.

122

Final Decree.

Filed January 23, 1915.

District Court of the United States, District of Maryland, at
Cumberland, Maryland.

No. 2, Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,
Complainant,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation,
Defendant.

Decree.

This cause came on to be heard in pursuance of the order for re-argument entered on January 15th, 1915, and all parties being present in open court by their counsel, counsel for complainant objected to the vacation and setting aside of the decree of December 24th, 1914, on the grounds that the constitution and laws of West Virginia as applied to the interstate commerce transactions disclosed in the pleadings and evidence are repugnant to the Commerce Clause of the Constitution of the United States and the Fourteenth Amendment thereof; and that if the application of said constitution and law of West Virginia to such interstate commerce is authorized by the

Act of Congress of March 1st, 1913, entitled "An Act divesting intoxicating liquors of their interstate character in certain cases," that said Act of Congress is repugnant to said Commerce Clause and the Fifth Amendment of the Constitution of the United States.

123 On consideration whereof it appearing to the Court that its decision and decree entered herein on December 24th, 1914, is in conflict with the decision of the United States Circuit Court of Appeals, for the Fourth Circuit, in the case of State of West Virginia, Appellant, vs. Adams Express Company, Appellee, No. 1325 in said Court, a copy of the opinion of the Court of Appeals being filed herewith, it is now ordered that said decree entered herein on December 24th, 1914, be and the same is hereby vacated and set aside. And thereupon this Court in conformity with the said decision of the United States Circuit Court of Appeals for the Fourth Circuit orders and decrees that the bill of complaint be and the same is hereby dismissed at the costs of the plaintiff. Thereupon came the plaintiff and presented its petition for an appeal from this decree to the Supreme Court of the United States, and its assignment of errors and said appeal is allowed in open court.

JOHN C. ROSE,
District Judge.

124 Clerk's Office, U. S. Circuit Court of Appeals, Fourth Circuit.
H. T. Melgney, Clerk, Richmond.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1325.

STATE OF WEST VIRGINIA, Appellant,
versus
ADAMS EXPRESS COMPANY, Association, Appellee.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston.

[Argued Dec. 9, 1914.]

Decided Jan. 13, 1915.]

Before Knapp and Woods, Circuit Judges, and Waddill, District Judge.

Fred O. Blue and Wayne B. Wheeler, for Appellant, and George E. Price and Joseph S. Grayon (Lawrence Maxwell on brief), for Appellee.

WOODS, *Circuit Judge*:

124a The State of West Virginia brought this suit in the Circuit Court of Kanawha County against the Adams Express Company, R. H. Clendenin and Edward Beigel alleging; that Biegel, a resident of Cincinnati, Ohio, sent through the mails

to many persons in West Virginia circular letters soliciting the purchase of intoxicating liquors, contrary to the law of the State; that Clendenin, induced by the solicitation, ordered from Beigel one-fourth of a barrel of beer which was carried by the Adams Express Company from Cincinnati to Charleston, West Virginia, and was there held by the carrier ready for delivery when the bill was filed; and that Beigel intends to continue to ship into West Virginia by the defendant Express Company beer on orders so solicited. The breach of duty to the State alleged against the Express Company was its failure to use due diligence to ascertain before carrying the beer whether the contract for its sale was made in pursuance of an illegal scheme of solicitation, and that by delivering the beer, as it intended, it would aid Beigel in his unlawful attempt to make sales in West Virginia, inasmuch as the statute makes the place of delivery the place of sale. Beigel was not served. The relief asked, with which we are now concerned, is that the State

"Be awarded an injunction against the said defendant, the Adams Express Company, restraining it, its agents, employees and representatives from delivering to the defendant R. H. Clendenin the consignment aforesaid of one-fourth barrel of draught beer; and that defendant, the Adams Express Company, its agents, employees and representatives, be enjoined from delivering to the defendant, or to any other person, any shipment of liquors manufactured by the Pabst Brewing Company and handled by said defendant Beigel, or any of his agents, representatives, or employees at any place where said defendant Express Company operates in the State of West Virginia, within the jurisdiction of the court, unless the consignee of any such liquors can show to the satisfaction of the defendant

Express Company, its agents, representatives and employees,
124b that he without solicitation from said Beigel, or any of his agents, representatives, or employees ordered the consignment of liquors for his own personal lawful use without having received from said Beigel, or any of his agents, representatives or employees, advertisements or letters soliciting orders for liquors, or price lists or order blanks advertising or soliciting from the consignee orders for liquors."

A preliminary order of injunction was made by the State Court, but upon removal of the cause to the District Court for the Southern District the District Judge, on motion of the Adams Express Company, dissolved the injunction and dismissed the bill, holding that the State law could not prevent solicitation through the United States mails for the sale of liquor, and that there is nothing in the Wilson Act or the Webb-Kenyon Act which authorizes the State to interfere with the shipment and delivery of liquors ordered by a citizen of West Virginia for his own personal use from a licensed dealer without the State.

The appeal requires a consideration of the scope and effect of the West Virginia Constitutional and Statute Law and the effect upon it of the Act of Congress of 1 March, 1913, known as the Webb-Kenyon Act.

1. In trying to comprehend the legislative purpose in prohibition

statutes it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage. The sale being the most usual and obvious means by which drinking is accomplished, legislation is more often directed against the sale. But it is upon the recognized evil of individual consumption as a beverage that the right of a State under its police power rests to enact prohibitive legislation; and in the exercise of that right it cannot be denied that the State may legislate not

124c only against acts which would constitute a sale at common law, but against other acts within its borders, such as deliveries by common carriers, which tend to defeat or weaken its public policy of preventing the consumption of liquor as a beverage.

We are not concerned in this case with the question whether the State Legislature or the State Legislature and the Congress in conjunction can forbid a citizen to drink intoxicating liquors or purchase them in another State and bring them into the State of West Virginia for his own consumption; but with the very different question whether the State may forbid the sale of liquor in its borders and make the delivery by a carrier a sale at the place of delivery; and whether the Congress can prohibit the transportation in the State by the common carrier of liquor so to be delivered contrary to the law of the State. We think it can be demonstrated that this question must be answered in the affirmative—that it can be made perfectly manifest that shipments into the State and deliveries by common carriers, by which liquor dealers outside of prohibition States were enabled to thwart the efforts of State governments to save the people of the State from the liquor evil, have been forbidden by State legislation made valid by the withdrawal of the protection of interstate commerce from such shipments under the Act of Congress known as the Webb-Kenyon Act.

The amendment to the Constitution of the State of West Virginia, known as section 46, ratified in November, 1912, prohibits "the manufacture, sale and keeping for sale" of intoxicating liquors, with exceptions not material here; and it provides that "the Legislature shall, without delay enact such laws, with regulations, conditions,

124d securities and penalties as may be necessary to carry into effect the provisions of this section." On 11 February, 1913, the Legislature enacted a statute to take effect 1 July, 1914, which in section three contained this provision:

"Except as hereinafter provided, if any person acting for himself, or by, for or through another shall manufacture or sell or keep, store, offer, or expose for sale; or solicit or receive orders for any liquors or absinthe or any liquors compounded with absinthe, he shall be deemed guilty of a misdemeanor; and any person, except a common carrier, who shall act as the agent or employe of such manufacturer or such seller, or person so keeping, storing, offering or exposing for sale, said liquors, or act as the agent or employe of the purchaser of such liquors, shall be deemed guilty of such manufacturing or selling, keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment

or delivery of such liquors is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employe."

2. At the argument it seemed to be conceded that State legislation would be effective to make the place of delivery the place of sale, with respect to transactions within the scope of the State legislative power. The power of the State to enact laws regulating and controlling commercial transactions within its own limits, subject only to the condition that the regulations shall not arbitrarily impair property rights or interfere with interstate commerce, has been affirmed in *Sinnot vs. Davenport*, 63 U. S. 227. *Delamater vs. South Dakota*, 205 U. S. 93, and innumerable other federal and State decisions. "The internal commerce of a State—that is, the commerce that is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the federal government." *Sands vs. Manistee River Improvement Company*, 123 U. S. 288; *Hart vs. State*, 87 Miss. 171, 39 So. 124e 523, 112 Am. St. 437. This power includes the regulation of sales and the change of the general rule of the common law, that delivery to the carrier is a completion of the sale, into a general statutory rule as to every sale that it shall not be complete until delivery to the consignee, or into a special statutory rule that the sale of intoxicating liquors shall not be complete until delivery to the consignee, and that the place of delivery shall be the place of sale. The validity of such a special statutory regulation is illustrated in *State vs. Herring*, 145 N. C., 418, 58 S. E. 1007, 122 Amer. St. 461, and *State vs. Patterson*, 134 N. C. 612, 47 S. E. 808.

3. There is nothing in the amendment of the State Constitution that takes away by implication this power of the legislature to provide that the place of delivery shall be the place of sale. It is true that the constitutional amendment prohibits "the manufacture, sale and keeping for sale" of liquors. But it does not indicate a purpose to deprive the legislature of the power to determine what shall be considered the place of sale. Even if it be assumed that the framers of the amendment, in prohibiting the sale of liquors, had in view the general common law rule that the sale was to be considered made out of the State on delivery to the carrier and intended to incorporate that conception of a sale into the prohibition of the organic law of the State as a permanent State policy, that by no means implies an intention to take from the legislature the power to make other regulations and restrictions to be conveniently altered or added to or repealed from time to time as circumstances might require, but not considered proper to be imbedded in the constitution as the permanent law of the State. This obvious and general principle was applied to constitutional and statutory provisions as to the liquor traffic in *State vs. Hooker* (Okl.), 98 Pac. 964.

4. The point is earnestly pressed that even if it be true 124f that under the statute in West Virginia delivery in any county of the State is a sale in that county, yet under an exception of the statute, the express company has the right to promote

illicit sales by daily carrying liquor to be delivered in the State in violation of its laws. The section of the statute above quoted does exempt a common carrier from the provision that any person "who shall act as the agent or employee of such manufacturer, or such seller or person so keeping, storing, offering or exposing for sale liquors shall be deemed guilty of such manufacturing or selling, keeping, storing, or exposing for sale as the case may be" and shall be punished as provided by this section. This exemption of the common carrier from punishment by fine and imprisonment for the carriage or storing of liquor cannot by any stretch be held to imply consent by the State that the carrier may engage in the business of promoting the liquor traffic by conveying it to the place of sale. For such action the carrier by reason of the difficulties of its position may well be exempted, as in this instance, from punishment as a criminal the same as if it were a principal in the crime of keeping or selling. But the doctrine is well established that one who either from carelessness or design habitually serves those who are engaged in pursuits either criminal or detrimental to the public interest as established by legislative enactment, should be restrained by injunction from rendering the nefarious service, even if that service be not criminal in the sense that statutory punishment is not prescribed for it, or even if the statute excludes the idea of punishment for it as an active and knowing participation in the principal crime. The exception of the carrier from punishment by fine or imprisonment as an active participant in the crime of selling or keeping or storing, because of the difficulties of its situation, does not at all imply that habitual aid extended to others violating the law shall not be subject to injunction as a nuisance. If the obstruction of commerce be a nuisance subject to the remedy of injunction, as was held in *In Re Debs*, 158 U. S. 564, surely the active perversion of commerce by conveying goods to be delivered in violation of law may be enjoined. The principle, which seems too plain for further elaboration, is thus stated in the case cited:

"Every government, entrusted by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrongdoing to one resulting in injury to the general welfare is often of itself sufficient to give it standing in court."

5. The requirement relied on by the express company that common carriers shall keep books showing the name of the consignee, etc., may better be regarded as a means of gaining information upon which to seek relief against the transportation and delivery by carriers of contraband liquor as distinguished from that to be legitimately used under the exceptions set out in the statute, than as a consent that they should transport and deliver contraband liquor.

6. The right of the State to an injunction against the persistent transportation by the express company of liquor to be delivered in

West Virginia, in pursuance of a contract of sale made in another State, is reinforced by the fact that the express company has transported the liquor which Clendenin was induced to order from Beigel by solicitation through circulars and price lists, expressly forbidden and made criminal by section 8 of the statute, and that the express company intends to continue to transport and deliver for 124*h* Beigel to purchasers in West Virginia liquors which he has contracted to sell, and intends to deliver through the express company, on orders obtained by solicitation forbidden by the statute. But as we have endeavored to show, the relief of injunction is not dependent on this consideration.

7. It makes no difference that the United States Mail was used for the solicitation. The Federal Government does not protect those who use its mails to thwart the police regulations of a State made for the conservation of the welfare of its citizens. The use of the mail is a mere incident in carrying out the illegal act, and affords no more protection in a case like this than a like use of the mails to promote a criminal conspiracy, or to perpetrate a murder by poison, or to solicit contributions of office holders in violation of the civil service law, or to obtain goods under false pretenses, *In Re Polliser*, 136 U. S. 257; *U. S. vs. Shayer*, 209 U. S. 39; *Hayner vs. State*, 83 Ohio 178; *State vs. Morrow*, 40 S. C. 221, 18 S. E. 853.

8. The express company further contends that the State is not entitled to an injunction against the delivery in West Virginia of the liquor which it has transported for Beigel, or against its intended transportation and delivery of liquor which Beigel intends to consign to other persons in West Virginia, on the assertion that these transactions are under Federal protection as interstate commerce and beyond the reach of the legislature of the State. This proposition is admitted to be sound, unless the Webb-Kenyon Act removes the protection and subjects the delivery of liquor in West Virginia to the inhibition of the State legislature, although the contract of sale be made in Ohio for the shipment of liquor to West Virginia.

9. The position is untenable that the Webb-Kenyon Act 124*i* has no application, and therefore is without efficacy to extend the scope of the State legislation to interstate dealings in liquor because that statute was not enacted until 1 March, 1913, after the West Virginia statute had been passed on 11 February, 1913. The point has not been decided by the Supreme Court of West Virginia. There is a dictum in *State vs. Miller*, 66 West Virginia 436, in favor of the position of the express company, where the question was the application of the Wilson Act to West Virginia legislation. But as the court expressly stated the point was not and could not be involved since the State statute under consideration had been reenacted after the passage of the Wilson Act. But even if this had been a direct decision we do not think it could prevail against the contrary view of the Supreme Court of the United States, for we venture to think the question is not one of the construction of a State statute, but of the force and effect of a Federal statute in a State law and on such an issue the decisions of the Supreme Court of the United States are controlling. That court thus determined

the matter in *In Re Rahrer*, 140 U. S. 545; in passing on the effect of the Wilson Bill:

"Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

This principal has been reaffirmed in *Butler vs. Gorely*, 146 U. S. 303, *Ernest vs. Missouri*, 156 U. S. 296; *Central P. C. R. Co. vs. Nevada*, 162 U. S. 512; *Silt vs. Westerberg*, 211 U. S. 31.

This is the Webb-Kenyon Statute including the title:

124j An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases.

"Be it enacted, etc., that the shipment or transportation, in any manner or by any means whatsoever, of any spiritous, vinous, malted, fermented or other intoxicating liquor of any kind, from one State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented or other intoxicating liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

10. The terms of the statute are so plain and unambiguous that we are unable to perceive that its interpretation requires any resort to construction. The Wilson Bill withdrew the protection of interstate commerce from liquor and made it subject to the State law only after arrival and delivery to the consignee. But under that statute, after arrival and delivery to the consignee "imported liquor fell within the category of domestic articles of a similar nature." In *Re Rahrer*, *Supra*.

The Webb-Kenyon Act is the result of a growing public conviction that it was an abuse of interstate commerce that even under the Wilson Bill liquor dealers in one State were protected in impairing or defeating the efforts of another State to root out or to minimize the evil of the use of liquor as a beverage. This statute prohibits the shipment or transportation of liquor from one State into another not only when it is intended to be sold in violation of any law of such State, but when it is to be received or possessed or in any manner used in violation of the State law. This is a direct recognition of the right of the State to prohibit the receipt or delivery as well as the possession and use of liquor, without trespassing upon the power of Congress to regulate interstate commerce. The State of West Virginia has enacted with reference to a contract for the sale of liquor that "the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier

to the consignee," and it expressly forbids a sale within the State. This makes the receipt or delivery have the effect of a sale and in forbidding the sale it forbids the receipt or delivery, which under the statute is the consummation of the sale. Thus it appears that the transportation and delivery already made in this case and the transportation and deliveries contemplated for the future fall within the express description of the transactions from which the Congress intended to withdraw the protection of interstate commerce. Any other construction would not only distort the language, but continue the obstacles to the enforcement of State prohibition laws which it was the manifest intention of the Congress to remove. The Supreme Court of Kentucky has held that although the State expressly prohibits the delivery of liquor by a common carrier and such prohibition is valid as to all intrastate shipments, yet the Webb-Kenyon Act does not permit such prohibition to extend to intrastate commerce where the liquor is for personal use. *Adams Express Company vs. Commonwealth*, 154 Ky. 426, 157 S. W. 908, 47 L. R. A. (N. S.) 342.

11. All other decisions we think are in complete accord with the conclusion we have reached, namely that the Webb-Kenyon Act puts without the protection of interstate commerce liquor shipped into the State to be sold, received, or used, when sale, receipt or use is forbidden by the State law. *Palmer vs. Express Co.*, 124/ (Tenn.) 165 S. W. 236; *State vs. Doe* (Kansas), 139 Pac. 1169; *State vs. Express Co.* (Ind.), 145 N. W. 451; *United States vs. Oregon-Washington R. & N. Co.*, 210 Fed. 378; *Van Winkle vs. State*, (Del.) 91 Atl. 385; *Ex Parte Peece*, (Texas) 170 S. W. 749; *Southern Express Company vs. State* (Ala.), 66 So. 115; *Amer. Express Co. vs. Beer* (Miss.), 65 So. 575. The general trend of Congressional debate on the bill attributed the same meaning to the act, as did also the opinion of the Attorney General given to the President on the question of its constitutionality. Since delivery by one party is necessary to the receipt by another, if receipt be forbidden by a statute, deliveries might well be enjoined as acts promoting illegal receiving of liquor. Under the West Virginia Statute they are the subject of injunction as sales within the State.

12. The constitutionality of the Webb-Kenyon Statute is attacked on the ground that it is an attempt by Congress to confer on State Legislatures the power to regulate interstate commerce. This we think is a complete misapprehension. That the Congress has power to outlaw and exclude absolutely or conditionally from interstate commerce intoxicating liquors or any other deleterious substance has been very often decided. *Ex Parte Rahrer*, *Supra*; *Lottery Case*, 188 U. S. 321; *Hoke vs. U. S.*, 227 U. S. 308; *Hipolite Egg Co. vs. United States*, 220 U. S. 45. The distinction is between things deleterious and things beneficial or innocuous. The power to regulate is the power to make reasonable rules of admission or exclusion. The power to exclude intoxicants absolutely or conditionally does not import the power to exclude sound wheat.

13. The following language of Mr. Justice White in *Vance vs*

124m Vandercook, 170 U. S. 438, referring to the regulations of the South Carolina dispensary law, was cited here and has been cited elsewhere as giving countenance to the notion that the Congress has no right to legislate against the shipment or transportation of liquor intended for personal use from a license State to a prohibition State.

"On the face of these regulations, it is clear that they subject the constitutional right of the non-resident to ship into the State and of the resident in the State to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges. The right of a citizen of another State to avail himself of interstate commerce cannot be held to be subject to the issuing of a certificate by an officer of the State of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right arises from the Constitution of the United States; it exists wholly independent of the will of either the law-making or the executive power of the State; it takes its origin outside of the State of South Carolina and finds its support in the Constitution of the United States."

It is perfectly manifest that this language refers to the constitutional provision giving the Congress control of interstate commerce to the exclusion of the States, and not to the power of the Congress under the authority of the Constitution to exclude absolutely or conditionally deleterious substances.

As to intoxicating liquors, though universally recognized as deleterious, the Congress has not seen fit to exclude them entirely from interstate commerce, but has made the exclusion on this condition, namely, that they shall not be transported by common carriers into particular States when such transportation would be especially injurious to the public interest in that, when they reach the State, they will derange and make inefficacious the police measures for the control of intoxicants which the State has seen fit to adopt. The courts can hardly find room to doubt that this qualified exclusion made in aid of the efforts of a number of the States of the Union to combat one of the greatest evils of human life is founded on deep reason and enlightened public policy.

We think that the State of West Virginia is entitled to the order of injunction prayed for and it will be so ordered.

Reversed.

125 *Petition for Appeal and Assignment of Errors.*

Filed January 23, 1915.

District Court of the United States, District of Maryland.

No. 2. Equity Docket. At Cumberland, Maryland.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,
Complainant,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation,
Defendant.

Petition for Appeal and Assignment of Errors.

Complainant prays an appeal from the decree entered herein on January 23, 1915, to the Supreme Court of the United States and assigns as error that this court erred;

1. In holding that the constitution and laws of West Virginia make the place of delivery in West Virginia the place of sale where a shipment of intoxicating liquor is transported by a common carrier from a point in another state and delivered to the consignee in West Virginia for the personal use of the consignee, in pursuance of a sale made by the shipper to the consignee in such other state.

2. In holding that the constitution and laws of West Virginia prohibit a liquor dealer in a state other than West Virginia from advertising the sale of liquors in such other state to be transported and delivered in pursuance of such sale to the persons to whom such advertisements may come for their personal use; such advertising being carried or by means of the United States mail.

126 3. In holding that the constitution and laws of West Virginia, if they make the place of delivery in West Virginia the place of sale, where a shipment of intoxicating liquors is transported by a common carrier from a point in another state and delivered to the consignee in West Virginia for the personal use of the consignee, in pursuance of a sale made by mail at the point of origin of said shipment in said other state, are not repugnant to the Commerce Clause of the Constitution of the United States and the Fourteenth Amendment thereof.

4. In holding that the constitution and laws of West Virginia, if they prohibit a dealer in a state other than West Virginia from advertising the sale of liquors in said other state to be transported and delivered to the persons to whom such advertisements may come for their personal use; such advertisements being carried on by means of the United States mail, are not repugnant to the Commerce Clause of the Constitution of the United States and the Fourteenth Amendment thereof.

5. In holding that the Act of Congress of March 1, 1913 entitled: "An Act divesting intoxicating liquors of their interstate character

in certain cases," authorized the state of West Virginia to apply its constitution and laws to said interstate commerce in intoxicating liquors for personal use of the consignee in West Virginia.

6. In holding that the Act of Congress of March 1 1913, entitled; "An Act divesting intoxicating liquors of their interstate character in certain cases," if it authorized the State of West Virginia to apply its constitution and laws to said interstate commerce in intoxicating liquors for the personal use of the consignees in West Virginia is not repugnant to the Commerce Clause of the Constitution of the United States and the 5th Amendment thereof.

127 7. In vacating its decree entered December 24, 1914.

8. In court dismissing the bill of complaint.

LAWRENCE MAXWELL,

WALTER C. CAPPER,

Solicitors for Plaintiff.

128 *Order of Court Prescribing Bond to be Given on Appeal.*

Filed January 23, 1915.

In the District Court of the United States for the District of Maryland.

In Equity.

THE JAMES CLARK DISTILLING COMPANY OF CUMBERLAND, MD.,
a Corporation,

vs.

WESTERN MARYLAND RAILWAY COMPANY, a Corporation, and
The State of West Virginia, a Body Politic and a Sovereign State.

Ordered, by the District Court of the United States for the District of Maryland, this 23rd day of January, 1915, that The James Clark Distilling Company, a corporation, plaintiff in the above entitled cause, give an appeal bond in the penalty of Two Hundred Dollars (\$200.00) for costs on its appeal to the Supreme Court of the United States, from the decree entered this day in said cause.

JOHN C. ROSE,

U. S. District Judge.

129

Appeal Bond.

Filed January 26, 1915.

Know all men by these presents, That we, The James Clark Distilling Company of Cumberland, Md., as principal, and William A. Buchholtz of Cumberland, Md., as surety, are held and firmly bound unto The Western Maryland Railway Company and the State of West Virginia, in the full and just sum of Two hundred dollars to

be paid to the said The Western Maryland Railway Company and the State of West Virginia, their certain attorney, successors or assigns: to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of January, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a District Court of the United States for the District of Maryland, in a suit depending in said Court, between The James Clark Distilling Company of Cumberland, Md., a corporation, plaintiff, and The Western Maryland Railway Company and the State of West Virginia, defendants, a decree was rendered against the said The James Clark Distilling Company of Cumberland, Md., and the said The James Clark Distilling Company of Cumberland, Md., having been allowed an appeal from said decree to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said The Western Maryland Railway Company and the State of West Virginia, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

130 Now, the condition of the above obligation is such, That if the said The James Clark Distilling Company of Cumberland, Md., shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE JAMES CLARK DISTILLING COMPANY OF CUMBERLAND, MD.,
By JNO. KEATING, *Its Vice President.*

[Seal of Co.]

WILLIAM C. BUCHHOLTZ.

[SEAL.]

Sealed and deliver- in presence of—

JNO. KEATING, *Secretary.*

WALTER C. CAPPER.

Approved by—

JOHN C. ROSE,

U. S. District Judge for the District of Maryland.

131 UNITED STATES OF AMERICA, ss:

To the Western Maryland Railway Company and the State of West Virginia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal from a decree of the District Court of the United States for the District of Maryland, entered on the 23rd day of January, 1915, in a cause pending therein wherein The James Clark Distilling Company, a corporation, is plaintiff, and you are defendants, to show cause, if any there be, why

the decree rendered against the said plaintiff as in the said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John C. Rose, Judge of the said District Court of the United States, this twenty-third day of January, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States District Court, Maryland.]

JOHN C. ROSE,
*Judge of the District Court of the United
States for the District of Maryland.*

Attest:

ARTHUR L. SPAMER,
*Clerk District Court of the United States
for the District of Maryland.*

Service of the within Citation acknowledged this 28th day of January 1915.

THE STATE OF WEST VIRGINIA,
By FRED. O. BLUE, *Its Attorney.*
THE WESTERN MARYLAND RAILWAY
CO.,
By BENJ. A. RICHMOND, *Its Attorney.*

132 *Plaintiff's Præcipe for Record on Appeal.*

Filed February 11th, 1915.

District Court of the United States, District of Maryland, at
Cumberland, Maryland.

No. 2, Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,
Complainant,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation,
Defendant.

Præcipe.

To the Clerk:—

Please incorporate into the transcript on appeal, the following portions of the record:

1. Bill of Complaint.
2. Plaintiff's Exhibit No. 1.
3. Answer of Western Maryland Railway Company.
4. Defendant's Exhibits Nos. 1 and 2.
5. Plaintiff's Exhibits Nos. 1, 2, 3, 4, and 5.
6. Petition of State of West Virginia to be made a party to this cause and Order of Court thereon permitting the State of West Vir-

ginia to be made a party unless cause to the contrary be shown as therein set forth.

7. Exhibits Nos. 1 and 2 of the State of West Virginia.

8. Order of Court making the State of West Virginia a party defendant.

9. Condensed Statement of Testimony as prepared by Appellants and agreed to by appellees and approved by the Court.

10. Opinion of the Court.

133 11. Decree.

12. Injunction.

13. Order of Court ordering a re-argument of this case.

14. Decree dismissing bill of complaint.

14½. Certified copy of the opinion of the United States Circuit Court of Appeals for the Fourth Circuit in State of West Virginia, Appellant, vs. Adams Express Company, Appellee, No. 1325.

15. Petition for appeal.

16. Assignment of Errors.

17. Order of Court prescribing amount of bond to be given on appeal.

18. Appeal bond.

19. Citation.

20. Order to transmit Record.

21. Clerk's Certificate.

LAWRENCE MAXWELL,
WALTER C. CAPPER,

Attorneys for Plaintiff.

Service of a copy of the foregoing præcipe acknowledged this 8th day of February, 1915.

FRED. O. BLUE,

Counsel for the State of West Virginia.

Service of a copy of the foregoing præcipe acknowledged this 10th day of February, 1915.

BENJ. A. RICHMOND,

*Counsel for Defendant The Western
Maryland Railway Co.*

Service of a copy of the foregoing præcipe acknowledged this 11th day of February, 1915.

JOHN PHILIP HILL,

*Counsel for Defendant The Amer-
ican Express Company.*

134

Order to Transmit Record.

And thereupon, it is ordered by the Court here, that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said Supreme Court of the United States, and the same is transmitted accordingly.

Teste:

ARTHUR L. SPAMER, *Clerk.*

Clerk's Certificate.

UNITED STATES OF AMERICA,

District of Maryland, To wit:

I, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the foregoing is a true transcript of the record and proceedings of the said District Court, together with all things thereunto relating in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, this 25th day of February, 1915.

[Seal United States District Court, Maryland.]

ARTHUR L. SPAMER, *Clerk.*

135 In the District Court of the United States for the District of Maryland.

No. —. Equity.

JAMES CLARK DISTILLING COMPANY OF CUMBERLAND, MD., a Corporation,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

To the Honorable John C. Rose, Judge of said Court:

The petition of the James Clark Distilling Company in the above entitled cause, respectfully shows:

That this Honorable Court passed a final decree in the above cause on the 23d day of January, 1915, and the plaintiff was allowed an appeal from said decree to the Supreme Court of the United States, provided the record was made up and filed in the Supreme Court of the United States within thirty days from said 23d day of January, 1914.

Your petitioner now says that ever since said 23d day of January, 1915, its attorneys have been constantly engaged in having its appeal in this case perfected, but that on account of the fact that counsel engaged in said case reside a great distance apart, your petitioner's attorneys have been delayed in effecting an agreement among said attorneys as to what should constitute the record, and as to the narrative form to which the testimony should be reduced; that all of said matters have now been agreed upon by counsel, and the Clerk of this Court is engaged in perfecting the transcript in said case, but your petitioner is informed that said Clerk may be unable to have the transcript perfected in time to have the same filed in the Supreme Court of the United States on or before the return day, to-wit the 23d day of February, 1915, and your petitioner therefore respectfully prays the Court to pass an order hereon, extending the

136 time for making up the said record and filing the same with the Clerk of the Supreme Court of the United States, for a period of twenty days from the said 23d day of February, 1915.

And as in duty bound, &c.

LAWRENCE MAXWELL,
WALTER C. CAPPER,

Attorneys for the James Clark Distilling Company.

Upon the foregoing petition it is ordered this 18 day of February, 1915, by the District Court of the United States, for the District of Maryland, that the time allowed the plaintiff in the foregoing cause for having the record of said case made up and filed with the Clerk of the Supreme Court of the United States, be and the same is hereby extended for a period of twenty days, from the 23d day of February, 1915.

JOHN C. ROSE,
District Judge.

137 [Endorsed:] No. 2. Equity. In the District Court of the United States for the District of Maryland. The James Clark Distilling Company, of Cumberland, Md., a Corporation, vs. The Western Maryland Railway Company. Petition and Order of Court. Mr. Clerk: Enter this Order on the minutes at Cumberland. John C. Rose, Judge. Walter C. Capper, Attorney and Counselor at Law, 10 Water Street, Cumberland, Md. Filed 18 February, 1915.

138 Supreme Court of the United States.

No. —.

THE JAMES CLARK DISTILLING COMPANY OF CUMBERLAND, MARYLAND, a Corporation, Appellant,

vs.

THE WESTERN MARYLAND RAILWAY COMPANY and THE STATE OF WEST VIRGINIA, Appellees.

Appeal from the District Court of the United States for the District of Maryland, at Cumberland, Maryland.

Stipulation for Reducing the Printed Record.

It is hereby stipulated that in printing the record on appeal, the Clerk may omit pages 59 to 75 inclusive of the typewritten record, being Petitioner's Exhibit No. 1, bill of complaint in State of West Virginia vs. Western Maryland Railway Company in the Circuit Court of Tucker County, West Virginia; and pages 76 to 79 inclusive of the typewritten record being Petitioner's Exhibit No. 2, the injunction order of the Circuit Court of Tucker County in said case, said two exhibits being duplications of Respondent's Exhibits Nos.

1 and 2 respectively. The Clerk shall also omit in printing the record pages 17 and 18, being duplicates of the railroad bill of lading shown on page 16.

LAWRENCE MAXWELL,
Attorney for Appellant.

BENJ. A. RICHMOND,
Attorney for Western Maryland Railway Company, Appellee.

FRED. O. BLUE,
Attorney for State of West Virginia, Appellee.

139 [Endorsed:] 857/24601. Supreme Court of the United States. The James Clark Distilling Company, of Cumberland, Maryland, a Corporation, Appellant, vs. The Western Maryland Railway Company and the State of West Virginia, Appellees. Stipulation for Reducing the Printed Record. Maxwell & Ramsey, Cincinnati, Ohio.

140 [Endorsed:] File No. 24,601. Supreme Court U. S., October term, 1914. Term No. 857. The James Clark Distilling Co., Appellant, vs. The Western Maryland Railway Company et al. Stipulation to omit parts of record in printing. Filed March 15, 1915.

Endorsed on cover: File No. 24,601. Maryland D. C. U. S. Term No. 857. The James Clark Distilling Company, appellant, vs. The Western Maryland Railway Company and The State of West Virginia. Filed March 5th, 1915. File No. 24,601.

(24,602)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 858.

THE JAMES CLARK DISTILLING COMPANY, APPELLANT,
vs.
THE AMERICAN EXPRESS COMPANY AND THE STATE OF
WEST VIRGINIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MARYLAND.

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1 UNITED STATES OF AMERICA,
District of Maryland, To wit:

At a District Court of the United States in and for the District of Maryland, Begun and Held at the City of Cumberland on the Last Monday in September (Being the Twenty-eighth Day of the Same Month), in the Year of Our Lord One Thousand Nine Hundred and Fourteen.

Present:

The Honorable John C. Rose, Judge Maryland District.
John Philip Hill, Esq., Attorney.
George W. Padgett, Esq., Marshal.
Arthur L. Spamer, Esq., Clerk.
William J. Feaga, Deputy Clerk.

Among other were the following proceedings, to wit.

In Equity.

THE JAMES CLARK DISTILLING COMPANY OF CUMBERLAND, MARY-
LAND, a Corporation,

vs.

AMERICAN EXPRESS COMPANY, a Joint Stock Association Formed
under the Laws of the State of New York.

2 *Bill of Complaint.*

Filed August 24, 1914.

In the District Court of the United States in and for the District of the State of Maryland, at Cumberland, Maryland.

In Equity.

No. 3. Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, a Corporation, Com-
plainant,

vs.

AMERICAN EXPRESS COMPANY, a Joint Stock Association Formed
under the Laws of the State of New York, Defendant.

To the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland, Sitting at Cumberland, Maryland:

The bill of complaint of The James Clark Distilling Company, of Cumberland, Maryland, a corporation and citizen of the State of

Maryland, against the American Express Company, a joint stock association formed under the laws of the State of New York, and a citizen and resident of the State of New York, respectfully shows and complains to your Honor as follows:

1. That your orator is a corporation legally incorporated, organized and existing under the laws of the State of Maryland, and as such, is a citizen of and an inhabitant of said State, residing therein and doing business in the City of Cumberland, in said State, and as such corporation, it is now and for a long time past, has been engaged in the business of manufacturing, selling and dealing in spirit-ous and fermented liquors, and for many years last past has been doing a large and profitable business by the sale of such liquors and merchandise to persons residing in the States of West Virginia, Ohio, Pennsylvania, and elsewhere.

2. That the defendant, American Express Company, is a common carrier and a joint stock association formed under the laws of the State of New York, and is a citizen and resident of said State of New York, and for several years last past has been and is now a common carrier engaged in the transportation and delivery of packages of goods, wares and merchandise, over the line of The Western Maryland Railway Company, a corporation, from the City of Baltimore, Maryland, westerly through the States of Maryland, Pennsylvania and West Virginia, and into *the* through the City of Cumberland, in Maryland, and from thence into and through the Counties of Mineral, Grant and Tucker, in said State of West Virginia, and for some years past has been and is still now operating as such common carrier through said States, and is, therefore, an Express Company engaged as such common carrier in interstate transportation of goods, wares and merchandise between and through said States, and as such common carrier, between the States of Maryland and West Virginia, is engaged in interstate commerce, and as such, is one of the Express Companies subject to the Act of Congress to regulate commerce under the Interstate Commerce Clause of the Constitution of the United States, approved February 4th, 1887, and all amendments thereto passed by Acts of Congress since said date, and especially the Act of Congress approved June 18th, 1910, commonly called the Act to Regulate Commerce.

3. Your orator further charges that said American Express Company, is operating as a common carrier aforesaid through the States of Maryland and West Virginia under an agreement with The Western Maryland Railway Company, a railroad corporation and common carrier, owning a line of railroad and engaging in interstate commerce between the aforesaid States, and that said defendant, under its aforesaid agreement is equipped with all necessary cars and other vehicles and instrumentalities and facilities for the shipment or carriage of goods, wares and merchandise, and the handling of such property transported by it from Cumberland, Maryland, to said Counties of Mineral, Grant and Tucker, in West Virginia, and runs and operates from Cumberland, Maryland, through said Counties of West Virginia, daily express trains so equipped for such transportation, and has and maintains stations

and platforms at various points in Mineral, Grant and Tucker Counties, West Virginia, at and from which to deliver goods, wares and merchandise so transported from Cumberland to said places, and has a station for such delivery of such merchandise so transported in the town of Parsons, in Tucker County, West Virginia, in constant charge of regular Agents, and has at the City of Cumberland, Maryland, an office and station in charge of competent employees and agents, for the receipt and acceptance of all lawful goods, wares and merchandise tendered said company for transportation, to all said points in the State of West Virginia, and that by reason of all the foregoing, it is the legal duty of said Express Company, as such common carrier in interstate business, to accept for transportation over its said lines, all lawful goods, wares and merchandise delivered to its office or station at Cumberland, Maryland, for transportation

by it, from Cumberland through said States of Maryland and West Virginia to said points of delivery in said Counties of West Virginia, and that by said Act of Congress, commonly called the Act to Regulate Commerce, and by said amendments thereof, it was made the duty of said defendant company to provide and furnish such transportation for such goods, wares and merchandise so tendered to it for transportation upon reasonable request therefor.

4. Your orator further says that by the aforesaid Act of Congress, and the amendments thereof, it was made unlawful for any common carrier, subject to the provisions of the same, to make or give any undue or unreasonable preference or advantage to any particular person, or to any particular description of traffic, in any respect whatsoever, or to subject any particular person, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and that for the reasons aforesaid, all the provisions of said Act are applicable to and binding upon said defendant express company in respect to all transportation of goods, wares and merchandise from Cumberland, in Maryland, to said Counties in West Virginia.

5. Your orator further charges that in the due and regular course of its business, it did on the morning of the 20th day of August, 1914, receive at Cumberland, Maryland by mail a written order from one Floyd Rosier, a citizen and resident of the town of Parsons, in Tucker County, West Virginia, to ship to him at Parsons, West Virginia, by the first train from Cumberland, Maryland, four quarts of alcohol of 1.88 proof, by express, which order to ship said liquor was accompanied by a money order for Four Dollars (\$4.00) to pay your orator for the same, and your orator now says that said order was a bona fide order in every respect, and was sent to your orator

without any solicitation on the part of any person inducing the said Rosier to send the same, and that said order stated on its face that it was for the personal use of the said Rosier, and your orator now charges that it has every reason to believe, and does believe, that said order came to it in a perfectly lawful manner, and that said liquor was intended for the personal use of the said Rosier, and that your orator has no reason whatever of any kind to

suspect that order for said liquor was given or intended to in any way violate the Laws of the State of West Virginia.

6. Your orator further charges that on said 20th day of August, 1914, it thereupon prepared said one gallon of alcohol of the proof named in said order for shipment to said Rosier, and presented the same for transportation to the defendant, which is the only express company shipping goods from Cumberland to Parsons by the aforesaid Western Maryland Railway, and that the agents and officials of said defendant in Cumberland, Maryland, refused to accept or transport the same, although your orator tendered to pay or satisfy to it all express charges for the delivery of said shipment at said town of Parsons to said Rosier, but that all of the agents and servants of the defendant refused to accept the same or to ship the same over its line to said town of Parsons, giving as a reason therefor that said express company had been enjoined by an order of the Circuit Court of Tucker County, State of West Virginia, from receiving, transporting or delivering any fermented or intoxicated liquors at or in said three Counties of said State, except on conditions set out in said injunction so burdensome in said business and traffic and interstate transportation of said liquors as made it impossible for said express company to comply with the same, said agents and other employees giving no other reason for their refusal to accept and ship said merchandise, whereupon your orator now charges that said defendant company has absolutely refused to accept said shipment of alcohol from Cumberland to Parsons to said Rosier, and refused to transport the same and still does so refuse, whereby your orator has been unable to make said sale of said alcohol to said Rosier, and has been and still is unable to ship the same to him, and has lost the profit upon said sale and has been thus prevented from doing said business in interstate commerce, which it was entitled to do, which said original written order of said Floyd Rosier and the money order he sent to pay for said liquor accompanying the same, and the triplicate bill of lading made out by your orator for the signature of the agent of the defendant in the usual course of business for the shipment of the said goods, and which said agent refused to sign, all in one exhibit, were filed by your orator in a case heretofore instituted in this Court against the Western Maryland Railway Company, which said exhibit your orator prays shall be made a part of this bill of complaint.

7. Your orator further shows that by an Act of the Legislature of West Virginia, passed February 11th, 1913, effective on the 1st day of July, 1914, the manufacture and sale, or keeping for sale, in the State of West Virginia, of malt, vinous or spirituous liquors, wine, porter, ale, beer, or any intoxicating drink, mixture or preparation of like nature, (except certain articles not pertinent to the issue in this case), were prohibited, and by said Act of the Legislature it was provided that the words liquors used therein should be construed to embrace all spirituous liquors or any other intoxicating drinks, mixture or preparation of like nature, and all malt or brewed drinks, whether intoxicating or not, and all liquids, mixtures or preparations, whether patented or not, which will produce intoxicating, and all beverages containing as much as one-half of one per cent.

8. whether patented or not, which will produce intoxicating, and all beverages containing as much as one-half of one per cent.

of alcohol by volume, and your orator now admits that said four quarts of alcohol, ordered by said Rosier, was one of the kind of liquors mentioned and covered by said Act of — Legislature of West Virginia, but your orator, now charges that said Act did not prohibit the sale by non-residents of the State of West Virginia to persons residing in West Virginia, of any of said liquors, where said liquors were purchased upon orders not solicited by the seller, and were desired for the consignee's own personal use, and that, therefore, the order of said Rosier was a perfectly lawful order for the reasons aforesaid, under the Laws of West Virginia, and that the transportation of such goods so purchased by the defendant express company was in no wise prohibited by said law, and your orator is now advised that the injunction granted by the said Circuit Court of Tucker County aforesaid, and served upon the defendant company, was no legal or valid excuse for its refusal to accept and ship in interstate transportation said alcohol so offered to it for shipment, unless it be true that the requirements and restrictions set out in said injunction upon the defendant company, were in fact so burdensome to the said interstate business of said company, that it could not comply with the same, which your orator does not admit, but claims that said reason given by the defendant for not making said shipment for your orator, presents no valid grounds for the aforesaid denial of your orator's rights in the premises.

8. Your orator further charges that it owns and has on hand for sale and disposition, within the State of Maryland, a large and valuable quantity of various liquors of all kinds, covered by

9 the description in said Act of the Legislature of West Virginia, and that prior to the service of said injunction upon said defendant, your orator was doing a lucrative business in shipping such liquors to persons residing in West Virginia, upon their own personal, unsolicited orders, for their own personal use, all of which sales and shipments your orator is advised were in no wise contrary to the laws of West Virginia or any federal law; but that in the manner aforesaid, your orator has been prevented and is still prevented from making any more of said shipments over the line of the defendant to points in said three Counties in West Virginia, and that a large part of its aforesaid business, since the first day of July, 1914, was lawfully done upon orders from said three Counties, but that it is now informed by said defendant that it, under the mandate and restrictions of said injunction, will hereafter, accept none of said liquors for transportation to your orator's said customers in said three counties in West Virginia upon their said orders, and that there is no other Express Company, or other practicable means of transportation by which your orator can serve its said customers in and through said three Counties in West Virginia, except by the express facilities of the defendant, and that your orator has, therefore, no other means of serving its said customers, except by interstate transportation over said express line, by reason of all of which your orator, unless the defendant is restrained by the order and injunction of this Honorable Court, will be wholly deprived of any and all such legitimate business which it otherwise could do with its said customers, in said three

Counties in West Virginia, upon their orders as aforesaid, and its said business to that extent will be wholly destroyed and your orator will thereby lose a very large and profitable business and a large amount of profit much exceeding in value the sum of Three Thousand Dollars (\$3,000.00), and that the matters in dispute as aforesaid exceed, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00).

9. Your orator therefore charges that the defendant has violated and is continuing from day to day to violate its duty as such interstate carrier, to provide and furnish transportation upon the reasonable request of your orator, of its said lawful goods, wares and merchandise, which it desires to ship to its customers in said three Counties in West Virginia, and is, therefore, acting in defiance of its duty as set out in Section 1 of said Act of Congress, commonly known as the Act to Regulate Commerce, and the amendments thereof, and that the defendant has already violated and is continuing from day to day to violate the provisions of Section 3 of said Act, by subjecting your orator and its aforesaid business and traffic in said liquors to an undue and unreasonable prejudice and disadvantage, and by its said conduct, has destroyed the aforesaid lawful interstate traffic and business of your orator, with its said customers in said three Counties of the State of West Virginia, and is, therefore, obnoxious to the condemnation of the provisions of said Section 3 of said Act, and by reason of the same, your orator is entitled to all the rights and remedies by a complaint or suit in this Court against the defendant for the prevention and redress of said wrong provided or allowed by and under any and all laws of the United States.

10. Your orator further charges that if the defendant persists in its determination to refuse to accept for shipment said traffic of your orator, its violation of said Act of Congress and of its duty thereunder, will be of daily occurrence, for each of which violations, your orator, under said Act, would be entitled to an action at law, in each of which actions it could recover a small amount of damages, but that such suits at law would afford your orator no full, complete and adequate remedy against the defendant on account of the vast multiplicity of suits, which would be necessary on its part to obtain reparation for each and every one of said particular causes of damage, and that suits at law would not only furnish your orator no adequate remedies at law, but that unless it is speedily adjudged by a court of competent jurisdiction, in matters of interstate commerce, that your orator has the right to make such shipments of goods, and that said defendant shall be compelled by the mandate of this Court to accept and transport the same to your orator's customers, in the State of West Virginia, will entirely cease to send in any such orders, and your orator will thereby lose all its aforesaid business permanently, and its loss will thus be irreparable, and your orator is therefore, advised that its only complete and adequate remedy under the law and facts in this case, is by an application to this Honorable Court for the passage of a decree in the nature of a mandatory order or injunction against the defendant, commanding and requiring it to cease refusing to accept and transport over its

express line, from Cumberland, Maryland, to points in said three Counties in West Virginia, your orator's merchandise as aforesaid, and commanding and requiring said defendant to accept the same for transportation, and to transport the same in interstate commerce, from Cumberland, Maryland, and to deliver the same, by means of its express line, to such points in said three counties in West Virginia, to which said goods shall be consigned by your orator, where the defendant maintains a permanent office with a regular agent for receiving and delivering goods, and keeping a record of the same as required by the Law of the State of West Virginia.

12 11. To the end, therefore, that the defendant, American Express Company, may answer the premises and that a decree of this Honorable Court may be passed strictly commanding and enjoining the defendant, its servants, agents, employees and officers, and each of them, to cease refusing to accept for transportation over its express line, in due course of business, from Cumberland, to points of delivery in the Counties of Mineral, Grant and Tucker, State of West Virginia, all such aforesaid liquors ordered by the said Floyd Rosier or other customers of your orator, for their own personal use, and without solicitation on the part of your orator, and enjoining and commanding the defendant, its servants, agents, employees and officers to accept from your orator all such merchandise as aforesaid, presented to it for shipment over its line to said points in West Virginia, and enjoining and commanding the defendant, its servants, agents, employees and officers to transport the same in interstate commerce, from Cumberland, in the State of Maryland, to all such points on its express line in said three Counties in West Virginia, where the defendant maintains a permanent office or station with a regular agent for receiving and delivering such goods, and for the keeping of a record of the same as required by the Law of West Virginia, and perpetually requiring and commanding the defendant, its agents, and servants to deliver all such liquors, presented for shipment by your orator, over its line at said points in said three Counties in West Virginia, to the consignees thereof upon such aforesaid orders of your orator's customers, and that your orator may have such other and further relief as its case may require.

13 May it please your Honor to pass an order hereon, to be served by the United States Marshal for the District of Maryland, upon the defendant herein, commanding and requiring it to be and appear in this Court, at Cumberland, Maryland, on some certain day to be fixed by the order of this Court, to thereupon answer the premises and show cause, if any it has, why such decree should not be passed as prayed.

And as in duty bound, etc.,

WALTER C. CAPPER,
J. PHILIP ROMAN,
Solicitors for Complainant.

STATE OF MARYLAND,
Allegany County, To wit:

I hereby certify that on this 22nd day of August, 1914, before me, the subscriber, a Notary Public, in and for the State and County

aforesaid, personally appeared John Keating, Vice President and Treasurer of The James Clark Distilling Company of Cumberland, Maryland, the complainant in the above case, and made oath in due form of law that he is such Vice President and Treasurer of said Company, and familiar with its business and affairs, and is fully acquainted with the matters and things set out in the foregoing bill of complaint, and that the matters and things therein stated and set forth are true to the best of his information, knowledge and belief.

Witness my hand and notarial seal.

[NOTARY'S SEAL.]

MAURICE J. CLARK,
Notary Public.

My Commission expires 1st Monday in May 1916.

14 *Answer of the American Express Company.*

Filed September 17, 1914.

In the District Court of the United States for the District of Maryland, at Cumberland, Maryland.

In Equity.

No. 3. Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, a Corporation, Complainant,

vs.

AMERICAN EXPRESS COMPANY, a Joint Stock Association, Formed under the Laws of the State of New York, Defendant.

To the Honorable John C. Rose, Judge of the District Court of the United States, for the District of Maryland, sitting at Cumberland, Maryland:

The answer of American Express Company, the defendant in the above entitled suit respectfully shows:

1. That for the purposes of this suit, this respondent admits all the allegations of fact stated in the plaintiff's bill of complaint, but not the plaintiff's deductions therefrom, as therein set forth, such deductions being matters of law to be determined by this Honorable Court.

2. And further answering, this respondent says that in a suit in the Circuit Court of Tucker County, West Virginia, in Equity, entitled "The State of West Virginia, who brings her suit at the instance of Fred O. Blue, State Commissioner of Prohibition, plaintiff vs. the American Express Company, an association doing business in the State of West Virginia," an order or decree was, on the tenth day of August, 1914, passed by said Court, a copy of which is herewith filed as a part hereof, marked "Defendant's Exhibit No. 1", by which this respondent was enjoined

and prohibited from transporting intoxicating liquors to Tucker County, West Virginia, as set forth in said order; and this respondent is advised that it can not transport intoxicating liquors to Parsons, West Virginia, without the risk of violating the laws of the State of West Virginia and the terms of said injunction.

3. And this respondent hereby submits the matters of said bill to the determination of this Honorable Court for such order or decree as to the Court may seem proper.

And as in duty bound, etc.

HILL, ROSS & HILL,
Solicitors for Respondent.

STATE OF MARYLAND,
Baltimore City, To wit:

I hereby certify that on this sixteenth day of September, nineteen hundred and fourteen, before me, the subscriber, a Notary Public, in and for the State and City aforesaid, personally appeared Percy L. Wright, Superintendent, American Express Company, and made oath in due form of law that the matters and things stated in the foregoing answer are true, as therein set forth, to the best of his knowledge and belief, and that he is superintendent, American Express Company.

Witness my hand and Notarial Seal.

[NOTARY'S SEAL.]

GRACE E. HOWARD,
Notary Public.

16

DEFENDANT'S EXHIBIT No. 1.

Filed September 30, 1914, as of 17 September, 1914, by Leave of Court.

In the Circuit Court of Tucker County, West Virginia.

In Equity.

THE STATE OF WEST VIRGINIA, who Brings Her Suit at the Instance
of Fred O. Blue, State Commissioner of Prohibition, Plaintiff,
vs.

THE AMERICAN EXPRESS COMPANY, an Association Doing Business
in the State of West Virginia.

This day, in Vacation for the Circuit Court of Tucker County, came the plaintiff, State of West Virginia, who brings her suit at the instance of Fred O. Blue, State Commissioner of Prohibition, against The American Express Company, an association doing business in the state of West Virginia, and presented her bill, duly verified, to the undersigned Judge of said Court, praying that she may be awarded an injunction against the said defendant, The American Express Company, restraining and enjoining it, its agents and employees, from accepting any liquors from non-resident consignors for

carriage and delivery thereof to consignees who are citizens and residents of said county of Tucker, or elsewhere within the jurisdiction of the Court, unless said defendant express Company has first ascertained, by acting in good faith, with due diligence and caution, that such liquors were ordered by the consignees for their lawful, personal use, without solicitation on the part of the consignors, and that such liquors were offered by the consignors for acceptance and delivery thereof by the said defendant, to the consignees for

- 17 their lawful, personal use, without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said state; and from delivering liquors to any consignees in said county of Tucker, or elsewhere, within the jurisdiction of the Court, unless said express company has first ascertained, by acting in good faith, with due diligence and caution, that such consignees ordered such liquors for their lawful, personal use, without solicitation on the part of the consignors, and without intention, by any person interested therein, to be received, possessed, sold, or in any manner used in violation of any law of said state; and from delivering liquors to any person in said county of Tucker, or elsewhere within the jurisdiction of the Court, when such liquors were procured for himself or for himself and those associating with him to be received or kept for the purpose of use or gift as a beverage or for distribution or division among himself and those associating with him at any place which is kept or maintained by himself or by associating with others, or which he, by himself or by associating with others, in any manner aids, assists or abets in keeping or maintaining; and from delivering liquors, within the county of Tucker or elsewhere within the jurisdiction of said court, to any person unless the consignee signs the defendant's liquor record, in his own proper person, and not in the name of some fictitious person, or otherwise, and then only when the consignee has ordered the same for his personal, lawful use with no intention that the liquor so delivered is to be received, possessed, sold or in any manner used in said state in violation of any law thereof. And that the defendant, The American Express Company, be declared a common nuisance, and abated as such, in so far as it may undertake to handle or deliver any liquors within the said county
- 18 of Tucker, or elsewhere within the jurisdiction of the Court, other than is consistent with the allegations and prayer of said bill.

And said bill, having been read and considered, the injunction as therein prayed for is hereby awarded, and the said defendant, The American Express Company, its agents and employes, are hereby enjoined and restrained as prayed for in said bill, as above set forth in this order, which injunction is awarded without bond required of the plaintiff.

It is further ordered that an attested copy of this order be served upon the said defendant, The American Express Company, which service shall have the effect of enjoining the said express company according to the prayer of said bill and the injunction hereby awarded. And the clerk of the Circuit Court of Tucker County is hereby directed and ordered to enter this order in the Chancery

Record book of the Circuit Court of Tucker County, as a vacation order.

Done in Vacation in and for the Circuit Court of Tucker county at Keyser, Mineral county, West Virginia, this tenth day of August, nineteen hundred and fourteen.

F. M. REYNOLDS,
*Judge of the Circuit Court of
Tucker County, West Virginia.*

To Lawrence Lipscomb, Clerk of the Circuit Court of Tucker County.

F. M. R.

Received and entered here, in vacation, this the 11th day of August, 1914.

Attest:

LAWRENCE LIPSCOMB, *Clerk,*
By F. W. PRITT, *Deputy.*

19 STATE OF WEST VIRGINIA:

I, Lawrence Lipscomb, Clerk of the Circuit Court of Tucker County, do hereby certify that the foregoing is a true copy of an order that was entered in the above styled cause, on the 11th day of August, 1914, as the same appears of record in my office.

Given under my hand and the seal of said Court, this the 23rd day of September, 1914.

[SEAL OF COURT.]

LAWRENCE LIPSCOMB, *Clerk.*

STATE OF WEST VIRGINIA:

I, Francis M. Reynolds, Sole Judge of the Circuit Court of Tucker County, West Virginia, do hereby certify that Lawrence Lipscomb, whose genuine signature and attestation appears to the foregoing copy, was at the time of signing and attesting the same, the Clerk of said Court, and that the certificate and attestation thereto is in due form and by the proper officer and is entitled to full faith and credit.

Given under my hand this the 24th day of September, 1914.

FRANCIS M. REYNOLDS,
*Judge of the Circuit Court of Tucker
County, West Virginia.*

STATE OF WEST VIRGINIA:

I, Lawrence Lipscomb, Clerk of the Circuit Court of Tucker County, do hereby certify that Francis M. Reynolds, whose name appears to the foregoing certificate, is and was at the time of signing said certificate, the sole Judge of the Circuit Court of Tucker County, West Virginia.

Given under my hand and the seal of said Court, this the 25th day of September, 1914.

[SEAL OF COURT.]

LAWRENCE LIPSCOMB, *Clerk.*

20 *Petition of the State of West Virginia to be Made a Party
Defendant and Order of Court Thereon.*

Filed October 19, 1914.

In the District Court of the United States in and for the District of
Maryland.

In Equity.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,

v.

THE AMERICAN EXPRESS COMPANY, an Association Doing Business
in the State of West Virginia.

To the Honorable John C. Rose, Judge of the District Court of the
United States for the District of Maryland, Sitting at Cumberland,
Maryland:

*The Petition of the State of West Virginia, a Body Politic and a
Sovereign State, Tendered and by Leave of the Court Filed in
the Above Entitled Cause.*

Your Petitioner, the State of West Virginia, respectfully repre-
sents:

1. That she is a body politic and a sovereign State.

2. That heretofore, to-wit, on the tenth day of August, 1914, she
presented her bill to the Honorable F. M. Reynolds, Judge of the
Circuit Court of Tucker County, said State of West Virginia, (Tucker
County being one of the counties composing the Sixteenth
21 Judicial circuit of said State) praying for order of injunction
as therein set out, and a duly attested copy of said bill is now
herewith filed, marked "Petitioner's Exhibit No. 1", and is prayed
to be taken and read herewith as part hereof.

That said Judge of said Circuit Court of Tucker County, having
considered said bill and the prayer thereof, on said tenth day of
August, 1914, awarded injunction as therein prayed for. A duly
attested copy of said order awarding the injunction is now here
filed, marked "Petitioner's Exhibit No. 2", and is prayed to be taken
and read herewith as further part hereof.

Petitioner further represents that she now here adopts the allega-
tions set forth in said bill for all purposes as though the allegations
therein set forth were herein set forth in extenso.

Petitioner further represents that the plaintiff, the James Clark
Distilling Company, a corporation, on and since the first day of
July, 1914, has, by printed or written circular letters, order blanks
and price lists, solicited citizens of the State of West Virginia, par-
ticularly citizens thereof residing in said Sixteenth judicial circuit
aforesaid to give orders to said plaintiff, the James Clark Distilling
Company, for intoxicating liquors. That the purpose of such letters,

circulars, order blanks, etc., was to procure from the citizens of the State of West Virginia, particularly those residing within said Sixteenth judicial circuit aforesaid, orders for intoxicating liquors to be filled by the plaintiff, the James Clark Distilling Company; that the said James Clark Distilling Company intended to accept such orders and to ship such intoxicating liquors to such citizens

22 aforesaid by the defendant, the Western Maryland Railway Company.

Petitioner further charges that the plaintiff, the James Clark Distilling Company, has been, on and since the first day of July, 1914, shipping intoxicating liquors into the State of West Virginia, to the citizens thereof, without any effort to ascertain the character, ages and habits of the person who ordered the same, nor the purposes to which they intended to put such intoxicating liquors.

3. Petitioner further represents that, by provisions of the statute of your petitioner relative to intoxicating liquors in case of any sale, and the shipment of intoxicating liquors into the State of West Virginia by common or other carrier, the sale thereof is deemed to be made at the county wherein the intoxicating liquors are delivered. That the statutes of your petitioner, respecting intoxicating liquors, forbid the sale of, or soliciting of orders for, any intoxicating liquors in the State, except the sale of pure grain alcohol, by wholesale druggists to retail druggists, and by retail druggists upon prescription of reputable physicians or upon affidavit of the purchaser, but only then when to be used for medicinal, pharmaceutical, mechanical or scientific purposes; wine may also be sold under the laws of your petitioner when intended to be used for sacramental purposes. All other intoxicating liquors, by the laws of your petitioner, are forbidden to be sold.

4. Petitioner further represents that in any event respecting any sale and delivery of intoxicating liquors made within her jurisdiction, the common carrier, carrying and delivering the same is required to use good faith, due care and reasonable caution to ascertain that such intoxicating liquors are not to be received, possessed,

23 sold or in any manner used by any person interested therein in violation of the laws of your petitioner.

5. Petitioner further represents that the plaintiff, the James Clark Distilling Company, made no effort whatsoever to ascertain the age, habits or character of Floyd Rosier, the person named in the bill and who is alleged to have ordered the liquors in the bill mentioned from said plaintiff, the James Clark Distilling Company. And petitioner further represents that the plaintiff, the James Clark Distilling Company made no effort whatsoever to ascertain or to inform itself of the purposes, lawful or otherwise, that said Rosier intended to exercise respecting the intoxicating liquors mentioned in the bill. And petitioner further represents that the plaintiff, the James Clark Distilling Company, has on and since the first day of July, 1914, been shipping intoxicating liquors into the State of West Virginia, particularly to citizens in said Sixteenth judicial circuit aforesaid, which liquors were shipped into said State regardless of the purpose or use that the persons so receiving the same might make thereof.

And petitioner further represents that the provisions of her prohibition statute are in exercise of her police powers for the protection of public health, peace and morals of her citizens and residents within her jurisdiction.

6. Petitioner denies that the plaintiff, the James Clark Distilling Company, is entitled to the mandatory injunction prayed for in its bill.

7. Your petitioner further most respectfully represents that in view of the allegations herein, that she should be permitted to intervene herein and be made a party to this cause, and she therefore prays that she may be permitted to file this petition and be made a party herein.

24 And your petitioner further prays that the plaintiff, the James Clark Distilling Company, may be denied the relief sought by its bill, and may your petitioner have all such other, further, general and special relief as the nature of her cause may require or to equity may appertain.

STATE OF WEST VIRGINIA,
A Body Politic and a Sovereign State,
By HER COUNSEL.

FRED O. BLUE,
Counsel for the State of West Virginia.

STATE OF WEST VIRGINIA,
County of Kanawha, To wit:

Fred O. Blue, being duly sworn, says that he is State Commissioner of Prohibition of the State of West Virginia, the plaintiff named in the foregoing bill, and that he knows the contents thereof; that the facts and allegations therein contained are true, except such as are therein stated upon information and belief, and that as to such allegations he believes them to be true.

FRED O. BLUE.

Taken, sworn to and subscribed before me this 17th day of October, 1914.

My commission as Notary Public expires on the 26 day of April, 1923.

[NOTARY'S SEAL.]

FRANK LIVELY,
*Notary Public in and for the
County and State Aforesaid.*

25 In the District Court of the United States for the District of Maryland, at Cumberland, Md.

In Equity.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,
vs.
THE AMERICAN EXPRESS COMPANY.

Upon the foregoing petition, exhibits and affidavit, it is ordered, by the District Court of the United States for the District of Mary-

land, this 19th day of October, 1914, that said petitioner, The State of West Virginia, be permitted to file said petition and be made a party in the above entitled cause as prayed in said petition, provided no cause to the contrary be shown on or before the 29th day of October, 1914; a copy of said petition and this order shall be served forthwith by the Clerk upon the plaintiff herein or its counsel.

JOHN C. ROSE,
District Judge.

26

PETITIONER'- EXHIBIT No. 1.

Filed October 19th, 1914.

In the Circuit Court of Tucker County, West Virginia.

In Equity.

THE STATE OF WEST VIRGINIA, Who Brings Her Suit at the Instance of Fred O. Blue, State Commissioner of Prohibition, Plaintiff,

vs.

THE AMERICAN EXPRESS COMPANY, an Association Doing Business in the State of West Virginia.

To the Honorable F. M. Reynolds, Judge of the Circuit Court of Tucker County:

The Bill of Complaint and Prayer of the State of West Virginia, Who Brings Her Suit at the Instance of Fred O. Blue, State Commissioner of Prohibition, against the American Express Company, an Association Doing Business in the State of West Virginia.

1. Complaining plaintiff says that she is a body politic and a sever-ign state, and that the defendant, The American Express Company, is and was at the times herein referred to, an association doing business in the State of West Virginia, and is a common express carrier, operating in certain counties within the states of Maryland, Pennsylvania and West Virginia, over the ra-lroad lines of The Western Maryland Railway Company; that among other co-nties in West Virginia wherein the defendant Express Company operates are Mineral, Morgan, Grant, Tucker, Randolph, Barbour and Pocahontas; the said defendant express company maintains quite a large number of stations within the said states aforesaid, where it has agents and employes, and at which stations it receives and delivers express packages of all kinds; that among other stations in West Virginia where said express company has offices and agents

27 are those of the towns of Thomas, Davis, Parsons and Hendricks, in the county of Tucker; that the main line of said The Western Maryland Railway Company, over which the defendant express company operates, runs from the city of Baltimore, Mary-

land, to Elkins, West Virginia, passing through the city of Cumberland and the town of Westernport, said last named city and town both being in said state of Maryland, at which places the defendant express company has and maintains offices and has agents and employees, and where it receives and delivers express packages offered to it for carriage and delivery.

2. The plaintiff further represents that at the general election held in the state of West Virginia in November, 1912, the people of said state ratified a proposed amendment to the constitution of said state, whereby on and after the first of July, 1914, the manufacture, sale and keeping for sale of malt, vinous, or spirituous liquors should be prohibited in said state; that said amendment so ratified was and is in the words and figures following:

"SEC. 46. On and after the first day of July, one thousand nine hundred and fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, ale, porter, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this state. Provided, however, that the manufacture and sale and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the legislature may prescribe. The legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

3. Plaintiff further says that at the regular session of 1913, the legislature of West Virginia enacted chapter 13, Acts of 1913, the State Prohibition Law, in effect on and after July 1st, 1914, said act being enacted for the purpose of carrying into effect the provisions of the said constitutional amendment aforesaid.

4. The plaintiff further represents that under the laws of the state of West Virginia, on and since the first day of July, 1914, it has been unlawful to manufacture, sell, keep or store for sale, or offer or expose for sale, within said state, liquors as liquors are defined by section one of said act aforesaid; and further, that on and after the first day of July, 1914, it has been unlawful within said state for any person, acting for himself, or by, for or through another, to manufacture or sell, or keep, store, offer or expose for sale, or solicit or receive orders for, any liquors, as liquors are defined by section I of said act aforesaid; and further, that on and after the first day of July, 1914, it has been unlawful within said state for one to act as the agent or employe of the purchaser of liquors, as liquors are defined by said Act; and further, that on and after the first day of July, 1914, in case of a sale of liquors, in which shipment or delivery thereof is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery of such liquors is made by such carrier to the consignee, his agent or employe.

5. Plaintiff further represents that on and since the first day of July, 1914, it had been unlawful, within said state, for any person to

advertise or give notice, by signs, billboards, newspapers, periodicals, or otherwise, for himself or another, of the sale or keeping for sale of liquors, or to circulate or distribute any price lists, circulars or order blanks advertising liquors, or publish any newspaper, magazine, periodical, or other written or printed papers in which such advertisements or notices are given.

6. Plaintiff further represents that the Cumberland Brewing Company is a maker and manufacturer of beer, owning and operating a large brewery; the Cash Liquor Store is a liquor house, John A. Whitman is a liquor house, Smith and Roman is a liquor firm, James Clark Distilling Company is a distiller and seller of liquors, C. A.

Hice is a retail jug and bottle house, the German Brewing

29 Company is a brewer and seller of beer, the Diamond Liquor House, all of said city of Cumberland, and Peter Weisengoff,

a liquor dealer of said town of Westernport, all of whom, as well as others named herein, are engaged in the business of either manufacturing or selling, or both, liquors, as defined by said act, and all and each are engaged in the effort to receive orders and make sales and shipments of liquors to citizens residing in the state of West Virginia, particularly along the line of the defendant express company. That some of said firms and manufacturers, if not all, have in various ways sought to advertise or give notice of their business to citizens and residents of West Virginia, and have, in various ways, circulated and distributed price lists, circulars and order blanks, soliciting orders for and advertising liquors to the citizens of West Virginia, thereby bringing to the attention of such citizens and residents the articles of liquor kept and stored for sale by them respectively, to induce citizens and residents of said state to give orders for liquor they otherwise would not have thought of giving; that for the purpose of delivering liquors to the citizens and residents of said state along the line of the defendant express company, including the said county of Tucker, said persons and firms have shipped by the defendant express company such liquors to divers citizens and residents of West Virginia, for delivery to said citizens and residents at stations on the line of said defendant express company, within the state of West Virginia, including citizens residing in the county of Tucker. That in addition to shipping liquors by the defendant express company, said persons and firms aforesaid also have shipped such liquors by the Western Maryland Railway Company, a common carrier, operating as aforesaid. And thereupon, and as illustrative of the quantity of liquors carried and delivered by the defendant express company from non-resident liquor dealers to citizens and residents of the state of West Virginia, including citizens and residents residing at the town of Thomas, in the county of Tucker within said state, plaintiff avers and charges that the defendant express company received from non-resident liquor dealers, and carried and delivered to citizens and residents at said town of Thomas, from the 1st day of July, 1914, to the 21st day of July 1914, inclusive, approximately three hundred and fifty separate consignments of liquor; and further, as illustrative of the disposition and efforts on the part of non-resident liquor dealers to sell and deliver liquors to citizens and

residents of Thomas plaintiff further represents that there were carried and delivered by the Western Maryland Railway Company, a common carrier operating as aforesaid, within said period twenty-one days aforesaid, approximately three hundred separate freight packages of liquors from non-resident liquor dealers to citizens and residents of said town of Thomas.

Plaintiff is advised and so charges that the sales of such liquors, under and by virtue of the laws in such cases made and provided, were made at the place of delivery by the carrier to the consignees of such liquors, in all instances wherein such liquors were shipped by the consignors, upon orders solicited in any way by them from the said consignees within the state of West Virginia, or when intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any laws of the state of West Virginia.

7. Plaintiff further represents that by an act of the United States Congress, known as the Wilson Act, (26 Stat. 713, c. 728) it is provided:

"That all fo-mented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or Territory be subject to the operation in effect of the laws of such state or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

31 8. Plaintiff further represents that by act of the United States Congress passed subsequent to the Wilson Act, and known as the Webb-Kenyon Act (Act Cong. March 1, 1913, c. 90, 37 Stat. 699) it was provided:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, fermented, or other intoxicating liquor or any kind, from one State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, into any other state, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state or Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

And plaintiff further represents that she is advised and so charges that the defendant express company, on and since the first day of July, 1914, could not, nor can it now, lawfully deliver any liquors to any persons in West Virginia, except to those who have ordered the

same for their lawful, personal use, without solicitation on the part of the consignor, nor lawfully deliver any liquors to the consignee thereof when such liquors were or are intended by any person interested therein to be received, possessed, sold or in any manner used in said state in violation of any of the laws thereof. And thereupon plaintiff further says that she is advised and so charges that it was and is the duty of the defendant express company, through its agents and employees, before acceptance of liquors from non-resident consignors for carriage and delivery thereof to consignees in West Virginia, to ascertain, by acting in good faith, with due diligence and caution, whether such liquors were ordered by the consignees for their lawful personal use, without solicitation on the part of the consignors, and whether such liquors were offered by the consignors for acceptance and delivery thereof by the defendant to the consignors for their own lawful, personal use, without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said state of West Virginia.

32 9. Plaintiff further says that she is advised and so charges that the defendant express company, through its agents and employes, has been accepting, on and since July 1, 1914, and is yet accepting, (perhaps inadvertently) liquors from non-resident consignors for carriage and delivery thereof to consignees in the said State of West Virginia, among others being consignments of such liquors to citizens and residents of said county of Tucker, without having first ascertained, by acting in good faith with due diligence and caution, from the consignors and consignees, respectively, whether such liquors were ordered by the consignees for their own lawful, personal use, without solicitation on the part of the consignors, and whether such liquors were offered by the consignors for acceptance, carriage and delivery thereof by the defendant to the consignees, for their own lawful personal use without intent by any person interested therein to be received, possessed, sold, or in any manner used in said state of West Virginia in violation of any of the laws thereof; and that said defendant through its agents and employes, has made delivery of such liquors to citizens and residents in the said county of Tucker, without having ascertained, by acting in good faith, with due diligence and caution, whether such liquors were ordered by the consignees for their lawful, personal use without solicitation on the part of the consignors, and whether such liquors were to be received, possessed, or in any manner used by any person interested therein in violation of any laws of said state.

10. Plaintiff further represents that on and since the first day of July, 1914, it has been unlawful in said state of West Virginia for any person to associate with others to aid, assist, or abet in keeping and maintaining any club house, or other place, in which any liquor is received or kept for the purpose or use, gift, barter, or sale as a beverage, or for distribution or division thereof among the members of any club or association by any means whatsoever, and thereupon plaintiff further says she is informed and so charges that at certain towns in West Virginia on the line of the defendant express company, including the said town of Thomas,

liquors are procured by persons associating together for the purchase thereof, such liquors being ordered and shipped in the name of one of the parties so associating together, usually in the name of one known as the "boarding Boss", such liquors so purchased being intended for the joint use of those so associating together, the individual members whereof are usually known as "boarders"; that such liquors are purchased out of a joint fund to which the "boarders" contribute, and are received, usually, in the name of the "boarding boss", although at times in the name of one of the "boarders", and are kept, stored and distributed at a common place kept or maintained by the "boarding boss" himself, or by the said "boarding boss" and those associating with him as "boarders", or by one of the said "boarders" and those associating with him as "boarders", or by the "boarders" themselves, associating together, for the purpose of use or gift, as a beverage, or for distribution or division among the "boarders"; and such liquors are there used or given away as a beverage by those who so associate together. And thereupon plaintiff is advised and so charges, as she is informed and believes, that liquors have been shipped by non-resident liquor dealers, carried by the defendant express company, and delivered by it to the "Boarding boss" or member of an association as aforesaid; and particularly does the plaintiff charge that the defendant express company by and through its agents, in the month of July, 1914, deliver to Joe Venikitis, either a "boarding boss" or a "boarder" at said town of Thomas, four and seven eighths gallons of whiskey, which whiskey was received by him for the purpose of use or gift as a beverage and for distribution or division among the "boarders".

34 who had contributed either directly or indirectly, to a common fund for the purchase of said liquors, and who kept or maintained a common place where such liquors were stored or kept, and distributed or divided among those associating together. And thereupon the plaintiff further says she is advised and so charges that on and since the first day of July, 1914, it has been and is the duty of the defendant express company, by and through its agents, to make no delivery of liquors to any person in West Virginia except to a person who ordered the same for his own lawful, personal use and not for the use of others, particularly any association of persons, associating for the purpose of purchasing liquors to be kept and stored at a place kept or maintained by them in the manner as aforesaid, and there used or given away as a beverages or distributed or divided among those associating together.

11. Plaintiff further represents that she is advised and so charges that consignees of liquors have endeavored to and probably have in some instances, procured deliveries thereof from the defendant express company, at stations in the said county of Tucker, by the use of fictitious names and otherwise. And thereupon plaintiff further says she is advised and so charges that it is and has been the duty of the defendant express company, since the 1st of July, 1914, to deliver no liquors except upon the signing of the record by the consignee thereof, in his own proper person, and then only when the consignee has ordered the same for his personal, lawful use, with no intention

that the liquor so delivered is to be received, possessed, sold or in any manner used in said state in violation of any laws thereof.

12. Plaintiff is advised and so charges that notwithstanding that the brewery and liquor dealers hereinbefore named are non-
35 residents of the state, yet nevertheless they do not have the right, under the interstate commerce clause of the federal constitution, to solicit orders for liquors nor to sell liquors in the state of West Virginia, nor to ship liquors into the state of West Virginia, when the same are intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of the said state, and that the interstate character of such liquors, as advertised or sold by them, is divested by the Webb-Kenyon act in all instances wherein they advertise, solicit or sell liquors in the state of West Virginia or to any citizen thereof in the said state, when any such liquors are intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of the said state.

13. Plaintiff further says she is advised and so charges that it is the purpose of said brewers and liquor dealers aforesaid, as well as other outside brewers and liquor dealers, to advertise their liquors in the state of West Virginia, and to solicit in said state, from the citizens thereof, orders for liquors, and that they intend to ship into West Virginia by defendant express company, the liquors advertised by them and which they have for sale, particularly along the line of the defendant express company in the state of West Virginia, regardless of the purpose or use the consignee may have respecting such liquors. That it is the purpose of the outside liquor dealers to ship their liquors over the line of the defendant express company to any person in West Virginia who may order the same without ascertaining, and regardless of, the purpose or use the consignee may have respecting such liquors, and that the defendant express company has been and will continue to carry and deliver such liquors to such citizens and residents of such state, including those residing in said
county of Tucker; and therefore to permit the defendant ex-
36 press company to deliver such liquors is to make the same a common nuisance for the keeping, storing, selling and delivering of liquors within the state of West Virginia, if the defendant express company is permitted to deliver such liquors to the consignees when the liquors are to be received, possessed, sold or in any manner used by the consignee in violation of the law of the state of West Virginia.

14. Plaintiff therefore further represents that inasmuch as the outside liquor dealers are beyond the jurisdiction of the criminal courts of the state, and perhaps may therefore escape criminal prosecution under the laws of said state, she having no assurance that she can procure the persons of such outside liquor dealers for the purpose of trial, she is therefore advised and so charges that she has the right to invoke the aid of a court of equity to restrain and enjoin the defendant, the American Express Company, from delivering any consignment of liquors from outside liquor dealers to any point upon the line of said carrier or elsewhere in the state of West Vir-

ginia within the jurisdiction of the court, unless the said defendant, through its agents and employees, before acceptance of liquors from non-resident consignors, for carriage and delivery thereof to consignees in said county of Tucker, ascertain by acting in good faith, with due diligence and caution, whether such liquors were ordered by consignees thereof for their lawful, personal use, without solicitation on the part of the consignors, and whether such liquors were offered by the consignors for acceptance and delivery thereof by the defendant to consignees for their lawful, personal use, without any intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of said state of West Virginia.

In consideration of the premises, and inasmuch as the plaintiff is without adequate remedy save in a court of equity, she
37 therefore prays that she may be awarded an injunction against the said defendant, the American Express Company, restraining and enjoining it, its agents and employees, from accepting any liquors from non-resident consignors for carriage and delivery thereof to consignees who are citizens and residents of said county of Tucker, or elsewhere within the jurisdiction of the court, unless said defendant express company has first ascertained, by acting in good faith, with due diligence and caution that such liquors were ordered by the consignees for their lawful, personal use, without solicitation on the part of the consignors, and that such liquors were offered by the consignors for acceptance and delivery thereof by said defendant, to the consignees for their lawful, personal use, without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said state; and from delivering liquors to any consignees in said county of Tucker, or elsewhere within the jurisdiction of the court, unless said express company has first ascertained, by acting in good faith, with due diligence and caution, that such consignees ordered such liquors for their lawful, personal use, without solicitation on the part of the consignors, and without intention, by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of said state; and from delivering liquors to any person in said county of Tucker, or elsewhere within the jurisdiction of the court, when such liquors were procured for himself or for himself and those associating with him, to be received or kept for the purpose of use or gift as a beverage or for distribution or division among himself and those associating with him at any place which is kept or maintained by himself, or by associating
38 with others, or which he, by himself, or by association with others, in any manner aids, assists or abets in keeping or maintaining; and from delivering liquors, within the county of Tucker or elsewhere within the jurisdiction of said court, to any person, unless the consignee signs the defendant's liquor record, in his own proper person, and not in the name of some fictitious person, or otherwise, and then only when the consignee has ordered the same for his personal, lawful use with no intention that the liquor so delivered is to be received, possessed, sold or in any manner used

in said state in violation of any law thereof. And that the defendant, the American Express Company, be declared a common nuisance, and abated as such, in so far as it may undertake to handle or deliver any liquors within said county of Tucker, or elsewhere within the jurisdiction of the court, other than is consistent with the allegations and prayer of this bill; and may the defendant named in the caption of this bill be made party defendant hereto; and may the plaintiff have all such other, further, general and special relief as the nature of her case may require or to equity may appertain. And she will ever pray, etc.

STATE OF WEST VIRGINIA,
Who Brings Her Suit at the Instance of
Fred O. Blue, State Commissioner of Prohibition,
 By COUNSEL.

FRED O. BLUE,
 W. K. PRITT,
Counsel for Plaintiff.

39 STATE OF WEST VIRGINIA,
County of —, To wit:

Fred O. Blue, being duly sworn, says that he is State Commissioner of Prohibition for the State of West Virginia, the plaintiff named in the foregoing bill, and that he knows the contents thereof; that the facts and allegations therein contained are true, except such as are therein stated upon information and belief, and that as to such allegations he believes them to be true.

FRED O. BLUE.

Taken, sworn to and subscribed before me this 7th day of August, 1914.

My commission expires on the 7th day of April, 1923.

FRANK LIVELY,
Notary Public in and for said County and State.

STATE OF WEST VIRGINIA:

I, Lawrence Lipscomb, Clerk of the Circuit Court of Tucker County, do hereby certify that the foregoing is a true copy of a Bill of Complaint that was filed in the chancery cause of The State of West Virginia etc., against The American Express Company &c., as the same appears on file in my office.

Given under my hand and the seal of said Court, this the 12th day of October, 1914.

[Seal of Circuit Court of Tucker County.]

LAWRENCE LIPSCOMB, *Clerk.*

40-44 STATE OF WEST VIRGINIA:

I, Francis M. Reynolds, Sole Judge of the Circuit Court of Tucker County, West Virginia, do hereby certify that Lawrence

Lipscomb, whose genuine signature and attestation appears to the foregoing record, was at the time of signing and attesting the same, the Clerk of said Court, and that the certificate and attestation thereof is in due form and by the proper officer and is entitled to full faith and credit.

Given under my hand this the 12th day of October, 1914.

FRANCIS M. REYNOLDS,

*Judge of the Circuit Court of Tucker County,
West Virginia.*

STATE OF WEST VIRGINIA:

I, Lawrence Lipscomb, Clerk of the Circuit Court of Tucker County, do hereby certify that the Honorable Francis M. Reynolds, whose name is signed to the foregoing certificate, was at the time of signing said certificate the Sole Judge of the Circuit Court of Tucker County, West Virginia.

Given under my hand and the seal of said Court, this the 12th day of October, 1914.

[Seal of Circuit Court of Tucker County.]

LAWRENCE LIPSCOMB, *Clerk.*

* * * * *

45 *Order of Court Making the State of West Virginia a Party
Defendant.*

Filed December 9, 1914.

In the District Court of the United States for the District of Maryland, at Cumberland.

In Equity.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,
vs.

THE AMERICAN EXPRESS COMPANY, an Association Doing Business
in the State of West Virginia.

It appearing to the Court that no cause has been shown why the petitioner, The State of West Virginia should not be made a party in the above entitled cause, *vs* prayed in its petition, filed herein, on the 19th day of October, 1914, although due service of said Petition and Order of Court passed thereon on the 19th day of October, 1914, was admitted.

It is thereupon ordered by the District Court of the United States for the District of Maryland, this 9 day of December, 1914, that said Petitioner, The State of West Virginia, be, and it is hereby made a party defendant in the above entitled cause as prayed in said petition.

JOHN C. ROSE,
District Judge.

46 District Court of the United States, District of Maryland, at
Cumberland, Maryland.

No. 3. Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, a Corporation, Com-
plainant,

vs.

AMERICAN EXPRESS COMPANY, a Joint Stock Association Formed
under the Laws of the State of New York, Defendant.

Transcript of Evidence.

GEORGE J. GOCKE, a witness of lawful age, produced by the plain-
tiff, being duly sworn and examined by Mr. Walter C. Capper, at-
torney for plaintiff, stated that he was bookkeeper for the James Clark
Distilling Company, plaintiff in this case, and he identified a paper
dated Parsons, West Virginia, August 19, 1914, as being an order
received by the James Clark Distilling Company at Cumberland,
Maryland, through the United States mail from Floyd Rosier of
Parsons, West Virginia. Thereupon the following occurred:

Q. Will you state what knowledge you had in reference to the uses
that Rosier intended to put that alcohol to?

A. My knowledge of the order was he intended the alcohol for
his own personal use.

(COURT:)

Q. This is an order for alcohol in the form of pure spirits, or is it
alcohol in some other form?

A. It is 188% proof alcohol.

(COURT:)

Q. That is pretty near pure alcohol?

A. Yes, sir.

(COURT:)

Q. Whiskey is about 100% proof?

47 A. Yes, sir, or less.

Q. Pure grain alcohol, is it?

A. Yes, sir.

Q. Will you state whether or not the James Clark Distilling
Company, or any of its agents, in any manner solicited any order
from Mr. Rosier?

A. They certainly did not.

Q. And you say they had no knowledge whatever to what use
he intended to put that shipment?

A. Other than his statement, that he intended to put it to his own
use.

Q. How much alcohol does the order cover?

A. Four quarts—one gallon.

Q. And the price was?

A. Four dollars.

Q. Did the price accompany the order, and if so, in what way?

A. The money accompanied the order in the shape of a U. S. Postal Money Order.

Q. And that is exhibited here?

A. Yes, sir.

On Cross-examination by Mr. Benj. A. Richmond, attorney for the Western Maryland Railway Company, defendant, witness stated that Mr. Rosier stated that he wanted the alcohol for his personal use, but that witness had no knowledge as to what way he was going to personally use it. Outside of a use for mechanical purposes, witness would not use it for any purpose except rubbing, because it is not fit to drink, being too strong. The order speaks of 188% proof,

48 which is the percentage or strength of the alcohol. It would have an intoxicating influence if a man should drink it.

The James Clark Distilling Company did not know Rosier before he sent this order in and witness did not know whether that company had had business dealings with him before. Rosier sent the order on a plain piece of paper and witness did not know how Rosier got the address of the plaintiff firm. That firm did not employ any traveling salesmen to solicit business in that part of the country. The plaintiff tried to ship the order by American Express and they refused to ship it; they then tried to ship it by railroad and they refused it.

On further cross-examination by Mr. John Phillip Hill, attorney for American Express Company, witness stated that he understood that pure grain alcohol is used to increase the strength of certain intoxicating beverages. At the time this order was received the plaintiff company did not publish advertisements in newspapers, but had published such advertisements, possibly a month or two months before. Witness could not say whether this order was the result of some such advertisement previously published. After the first of July, 1914, plaintiff company did not publish any advertisements in West Virginia. Witness did not know how Mr. Rosier knew that the price of the alcohol was \$1.00 a quart; that Rosier may have given previous orders. Witness did not have any knowledge that Rosier intended the alcohol for his own personal use except what Rosier stated in his letter.

Thereupon Mr. Fred O. Blue, State Commissioner of Prohibition of the State of West Virginia moved to be made a party defendant in each case, which motion was granted and Mr. Blue proceeded to further cross-examine the witness. On such cross-examination

49 the witness stated that the general business of the James

Clark Distilling Company is the distillation and sale of whiskey. That company does not manufacture alcohol but only rye and malt whiskey. Does not sell any beer, but sells quite a lot of the alcohol such as was ordered by Rosier. Since the first of July, 1914, that company has sent written or printed circulars into the State of

West Virginia to solicit business, but not to any great extent. Witness could not say whether any of these circulars had been sent into Tucker County or whether Rosier had received any of them. These order blanks and solicitations gave the prices of all the different grades of liquor and alcohol sold by the plaintiff company. Witness does not know whether any such order blanks sent into West Virginia since the first of July came back to the company with orders. Witness believes that the kind of alcohol mentioned in Rosier's order could be diluted and used as a beverage, but does not know whether in fact it is so used. Witness cannot state whether any other shipments were made after the first of July to Rosier, or the amount of liquors that the plaintiff company has shipped into the State of West Virginia since the first of July.

50 JOHN KEATING, a witness of lawful age, produced by the plaintiff, being duly sworn was examined by Mr. WALTER C. CAPPER, as follows:

He is Vice-President and Treasurer of the James Clark Distilling Company which is engaged in the distilling and wholesale and retail liquor business. Witness had no knowledge of the order of Floyd Rosier except that it came in regular mail order business, and as that business is a cash business it does not become part of the company's record, and witness cannot say whether that company had made any previous shipments to Rosier or ever received any other order for him. Alcohol of the kind covered by the order is used for rubbing purposes and also for drinking, by mixing a gallon of such alcohol with a gallon of water. Sometimes they put it on a stove and put sugar in it, so they get whiskey for fifty cents a quart. That is to say they get it rectified instead of pure neutral spirits. They buy a gallon of alcohol and reduce it and so get alcohol rectified, but without the whiskey flavor. Witness does not know whether the firm solicited this order, unless it came in from advertising which had been carried on for forty years. The James Clark Distilling Company having been in business for forty years and having advertised for mail order business for thirty years. The company is a Maryland corporation with its principal office located in Cumberland. Since the first of July the company had been carrying on its regular mail order advertising in West Virginia. The custom of the company is to send out between fifty and one hundred thousand circulars every year. They get the names from the Clerks of the Courts of the various counties showing registered voters of their
51 county, with the post office addresses, and also purchase names from companies that make it a business of going from court to court and getting the names.

Cross-examination by Mr. BENJ. A. RICHMOND, attorney for the Western Maryland Railway Company:

The one hundred thousand circulars of which witness spoke of as having been sent out during a year were not sent to West Virginia alone, but also to Maryland, Virginia and Pennsylvania. The cir-

culars sent to points in West Virginia since the first of July, 1914, are the same as circulars sent to the same points prior to July 1, 1914. The company does not make beer, but manufactures spirituous liquors and also buys spirituous liquors. The sale of alcohol forms quite a large part of the company's usual business. Witness had never heard of Rosier before receiving this order marked for his personal use. Witness did not know what he really wanted to use it for, he may have wanted it to drink and he may have wanted it to rub himself with. Such alcohol is also used for the purpose of fortifying beers or wines. Plaintiff company attempted to ship the liquor by American Express but they refused to accept it and they then applied to Western Maryland Railway Company which also refused to accept it. Application was made to the Agent of the Railway Company and also to the Superintendent by the transferman of the plaintiff company. Witness understood that the defendant companies gave as a reason that they would not accept the shipment that an injunction had been issued against them. The James Clark Distilling Company has a branch house in Washington, and did have one at

52 Parkersburg, West Virginia, until June 30, 1913. It manufactures liquors just outside of Cumberland. The company's mail order business had been going on for thirty years. The order from Rosier was accompanied by a post office money order to pay for the shipment. Witness does not know how Rosier came to know that four quarts of alcohol would cost four dollars, unless he got it from one of the company's circulars. Witness could not state any manner in which the Western Maryland agent at Cumberland or at Baltimore, when applied to to ship liquors could ascertain whether the order for the liquor was given upon solicitation by the plaintiff company. If the railway company were required to ascertain whether Rosier wanted this liquor for his personal use, or whether he had ordered it on solicitation, witness does not know how they could do so. Witness stated that when a man says on the order that he wants it for his personal use "That is the only knowledge we have." In answer to a question by the Court, witness stated that the James Clark Distilling Company had not sent any circulars into West Virginia since the first of July advising applicants that the company would be unable to ship orders unless wanted for their personal use. The company until within thirty days of the trial had never kept the names of customers from whom orders were received. Names had always been obtained from the Clerks of the Courts and the company kept no list.

On cross-examination by Mr. John Philip Hill, attorney for American Express Company, witness stated and it was admitted by plaintiff that the shipment was offered to American Express Company and refused because of an injunction against it, copy of said injunction being filed as an exhibit with the answer of the
53 American Express Company; that said injunction was duly served on the express company prior to its refusal to accept the package. The same admission was also made in respect to the Western Maryland Railway Company.

On further cross-examination by Mr. FRED O. BLUE, witness testified as follows:—

Q. Upon direct examination you were asked as to what uses the consignee might make of this alcohol he ordered. Don't you know that also up in that country that alcohol being diluted could be used for speak-easy purposes?

A. That might be true. I have never been to one of their speak-easys, and I don't know what they use it for.

Q. In other words, while alcohol might be used for lawful purposes by Rosier, he also might use it for unlawful purposes?

A. Yes, I suppose he could.

Q. In view of that fact, when you received this order from a man unknown to you, did you seek to inform yourself as to what kind of a man he was, and the purposes to which he might put the alcohol?

A. We had no interest in Mr. Rosier. He was twenty-one years of age, and I have seen people drinking pure alcohol in West Virginia twenty-five years ago.

(COURT:)

Q. I presume you didn't know whether he was twenty-one or not?

A. We never get anything but a list of registered voters.

(COURT:)

54 Q. Was he on the list?

A. I don't know whether he was or not.

Q. You didn't know when you accepted this order whether Rosier was a minor or a man of full age?

A. No, we did not, and we didn't know whether he was a minor or not. If we had known he was a minor, we wouldn't have shipped it.

Q. Did you know whether he was a man of intemperate habits?

A. No.

Q. Did you know whether he was a man given to the use of narcotic drugs?

A. We didn't know anything about the man.

Q. Did you seek to ascertain these facts from this stranger, whether he was a man of intemperate habits or given to the use of narcotic drugs, or was a minor?

A. I don't think it is required of us to find out from a man his general reputation.

(Court instructs witness to answer the question.)

Q. (Question repeated by stenographer.)

A. No.

Q. Are the circulars or were the circulars you sent into West Virginia printed ones of a general kind?

A. Yes, sir.

Q. Do you yet have some of those same printed circulars, the same kind that you sent in to West Virginia since July 1, 1914?

A. That is, if any was sent.

55 Q. Upon your direct examination, you stated you had sent circulars into West Virginia, and I believe since the first of July, 1914?

A. I don't know whether we have since the first of July, but I guess we have; we have the business going on all the time.

Q. I will ask you to state whether or not you did send circulars and order blanks into West Virginia since the first of July, 1914?

A. I suppose we did. Personally, I couldn't say. I didn't see the circulars enclosed, and I didn't address them and didn't mail them.

Q. Who is connected with your Company who could tell us that?

A. I think I am safe in saying we did.

Q. Can you produce for the purposes of the Court and counsel, and make a part of this record some of the same kind of printed circulars and some of the blanks that you sent into West Virginia since the first of July, 1914?

A. I think so.

Q. Will you do so?

A. If our counsel requires it and wishes it.

(Papers produced—papers and blanks asked for produced by the witness.)

(COURT:)

Q. What is the reason on the back of this circular you have printed, "We put whiskey in barrels and half barrels with or without labels, at customer's option?"

56 A. Before the Prohibition law went into effect, in local option counties we had quite a business in whiskey put up in barrels and half barrels, and they took out a Government license, and have it bottled under a hundred different brands.

(COURT:)

Q. And if it was an honest man, he would prefer that the barrel be labeled?

A. Yes, sir, not the barrels, but the bottles; we had to brand the barrels on the outside.

Q. Since the first of July, your Company has been shipping whiskey into the State of West Virginia?

A. Yes, sir.

Q. The same as before?

A. Yes, sir.

Q. You made no effort to ascertain the character and ages and habits of the persons who ordered it, nor the purposes to which they intended to put the liquor, did you?

A. No, I don't think we have. I will produce circulars to show that the man must state he is twenty-one years of age, and wanted it for his personal use.

Q. When did you get those?

A. I don't know whether any of them are out or not. They are in the hands of the printer.

Q. Were any notices published by you in the papers of West Virginia, that the applicant will have to be twenty-one years of age, and that the liquor is for his own use?

A. We have not, but we are getting the circulars up as fast as possible, and will have printed under the man's name that
57 "I am twenty-one years of age, and this is for my personal use."

(COURT:)

Q. You haven't sent those out yet?

A. I don't think so; I am not sure.

Q. If your Company received an order for as much as a barrel of whiskey from West Virginia, would you have shipped it without making inquiry, as to what the person ordering it intended to make of that liquor?

A. I think we would.

Q. You would have shipped it then?

A. Yes, sir.

Q. Without making inquiry?

A. Yes, sir.

Q. You have been shipping into the counties of West Virginia a great deal of liquors since the first of July?

A. Yes, sir.

Q. In large and small quantities?

A. Not very large quantities; the quantities have been small since the first of July.

On further cross-examination by Mr. John Phillip Hill, attorney for American Express Company, witness stated that at the time this shipment was offered to American Express Company, witness did not believe that that company had any more knowledge of the order for the alcohol or the person who made it than the witness himself had.

58 Mr. STANTON ENNES, called as a witness for defendant being first duly sworn and examined by Mr. Benj. A. Richmond, attorney for defendant, The Western Maryland Railway Company stated that he was General Superintendent of that company with headquarters at Hagerstown. Beginning at Cumberland that company has on its line extending from Cumberland, Maryland, into the State of West Virginia regular stations and agents at the following points: Keyser, Westernport, Luke, West Virginia Central Junction, Shaw, Blaine, Potomac Manor, Harrison, Elk Garden, Schell, Gorman, Bayard, Dobbin, Henry, Thomas, Douglas, Hendricks, Davis, Hambleton, Parson, Montrose, Elkins, Bellington, Durbin, Beverly, Mill Creek and Huttonsville. Parsons is in Tucker County, West Virginia; from Tucker County to Cumberland the road runs through Grant and Mineral Counties. The company has a number of stations in the State of Pennsylvania where it receives shipments in Franklin, Adams, Fayette and Somerset Counties, and also quite a number of stops in Maryland where it receives shipments, such as Westminster, Hagerstown and Cum-

berland. Witness has read the terms and requirements of the injunctions granted by Judge Reynolds of Keyser and thinks it is physically impracticable for the company in the shipments of liquors to observe the terms of the injunction. When witness first saw the injunction — and in an effort to comply with it he thought that in doing business with an old reliable house like the plaintiff in this case the railroad company might accept the statement of the shipper that so far as solicitation was concerned the shipper had complied with the law. But it occurred to witness that if the shipper

59 had advertised in a Cumberland paper or some outside paper and these papers were carried into West Virginia that that would be a solicitation, and that further when it came to doing business with a man not so well established as plaintiff in this case the railroad company was absolutely helpless in determining whether the sale had been solicited or not, and when it came to ascertaining whether the receiver of the goods was going to use them in violation of the West Virginia law, witness thought it impossible to comply with the terms of the injunction. The rate on the shipment to Parsons, West Virginia would have been thirty cents and it would mean that at all stations in West Virginia the railroad company would have to take means to carry out these instructions, and witness did not see how the company could do it in a commercial way, taking into consideration the rates. Witness supposed the company in order to comply with the terms of the injunction would have to maintain some one to determine who the receiver was and what use he was going to make of the liquor. Witness gave the thing up as impracticable and instructions were given that the company could not comply with the law, (the injunction). The difficulty would be applicable at all stations in Maryland and Pennsylvania, where the company received goods. The company has not a sufficient force of detectives at stations in these three states to determine these questions and the costs of maintaining such a force would run into prohibitive figures.

Cross-examination by Mr. LAWRENCE MAXWELL, attorney for plaintiff:

Witness issued a verbal order against the reception of interstate liquor into West Virginia; this order absolutely forbade the receipt of any interstate shipment of liquor into Grant, Tucker and Mineral Counties. It was issued a day or two after notice of the injunction and included all liquor delivered to the railroad 60 company by a shipper or a connecting carrier. It was an absolute refusal to carry interstate shipments of liquor into those counties without regard to the quantity or any other condition or circumstance. The injunction was dated August 11th and this order was issued a day or two after the injunction. The witness has no knowledge that the company knew that the injunction was awarded. Does not know whether it was awarded ex parte or not. The company took no steps to have the injunction modified or vacated. Mr. Richmond as counsel for the company under authority of the witness ordered the shipments stopped.

61 WALTER A. YINGLING, a witness for defendants, being examined by Mr. Benj. A. Richmond, testified that he was freight agent at Cumberland for defendant, The Western Maryland Railway Company, and that after the injunction in Tucker County had been served he received instructions from Mr. Richmond, as counsel for that railway company not to ship any liquor into Grant, Tucker and Mineral Counties, West Virginia, and that none had been shipped. The railway company carries liquor for personal use into other counties in West Virginia from Cumberland when the order states that the liquor is for personal use and there is "nothing suspicious about it". Witness remembers the gallon of alcohol involved in this case being brought into his office for shipment sometime after August 14th, after the injunction had been served and after witness had received the instructions above noted. The shipment was brought to the railway company's freight office by Hirshman's transfer, and was accompanied by three or four gentlemen who wanted the witness to accept it for shipment to Parsons in Tucker County, West Virginia. Witness did not accept the shipment and gave as his reason for not accepting it that he had instructions from his Superintendent through General Counsel for the company, that on account of the injunction issued by Judge Reynolds the railway company was prohibited from accepting any liquor shipments for Grant, Tucker and Mineral Counties. But for these orders and the injunction, witness probably would have accepted the shipment. There was nothing suspicious about the shipment or the order; on the face of it it looked like a bona fide order. One of the gentlemen stated that he had offered the shipment to the Traffic Agent, Mr. Getty, and also to the Superintendent, Mr. Steiner of the Railway Company.

62 On cross-examination by Mr. Capper, counsel for plaintiff, witness stated that he refused the shipment solely because he had received orders from his superiors to receive no shipments of liquor for those three counties; that the plaintiff showed him the order and if he had been free to act would not have regarded this shipment as presenting anything suspicious.

Thereupon defendant, American Express Company offered in evidence Exhibit No. 1 filed with its answer. Thereupon the following occurred:

Mr. MAXWELL (counsel for plaintiff): "You admit that your Company has made no effort to dissolve the injunction, and that the injunction was issued *ex parte*?"

Mr. BLUE (representing the State of West Virginia): "It was issued as a preliminary injunction and no steps taken by the Defendant in either case."

Mr. RICHMOND (counsel for Western Md. Railway Co.): "The Western Maryland has not entered an appearance in Tucker County, I don't think. They have made no motion to dissolve the injunction."

Mr. MAXWELL: "Filed no answer?"

Mr. RICHMOND: "Filed no answer, and just stopped right there and obeyed the order."

Mr. MAXWELL: "The same is true of the American Express Company?"

Mr. HILL (counsel for defendant, American Express Co.): "Yes sir."

Mr. MAXWELL: "And you refused to ship, absolutely refused to ship?"

63 Mr. HILL: "Yes sir."

The foregoing transcript of evidence condensed and reduced to narrative form by counsel for plaintiff, examined and approved this 8th day of February, 1915.

FRED O. BLUE,
Counsel for the State of West Virginia.

The foregoing transcript of evidence condensed and reduced to narrative form by counsel for plaintiff, examined and approved this 10th day of February, 1915.

BENJ. A. RICHMOND,
Counsel for The Western Maryland Railway Company.

The foregoing transcript of evidence condensed and reduced to narrative form by counsel for plaintiff, examined and approved this 11th day of February, 1915.

JOHN PHILIP HILL,
Counsel for American Express Company.

Approved Feb. 11", 1915.

JOHN C. ROSE,
U. S. District Judge.

64

Opinion of the Court.

Filed December 18th, 1914.

In the District Court of the United States for the District of Maryland.

THE JAMES CLARK DISTILLING COMPANY, of Cumberland, Md., a Corporation,

vs.

THE AMERICAN EXPRESS COMPANY, a Joint Stock Association Formed Under the Laws of the State of New York.

ROSE, *District Judge.*

For the reasons stated in the opinion filed in the case of The James Clark Distilling Company of Cumberland, Maryland, a corporation, vs. The Western Maryland Railway Company, a corporation, the plaintiff may present draft of decree for an injunction to the effect therein indicated.

65

Opinion of the Court.

Filed December 18, 1914, in the case of

THE JAMES CLARK DISTILLING COMPANY, of Cumberland, Md., a
Corporation,
versus
THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

In the District Court of the United States for the District of
Maryland.

THE JAMES CLARK DISTILLING COMPANY, of Cumberland, Md., a
Corporation,
vs.

THE WESTERN MARYLAND RAILWAY COMPANY, a Corporation.

ROSE, *District Judge*:

Both the plaintiff and the defendant are Maryland corporations. The interposition of this court is invoked for the protection of rights said to be given by the Constitution and laws of the United States. The defendant operates a railroad between Cumberland, Maryland, and various stations in the counties of Mineral, Grant and Tucker, West Virginia, among them being the town of Parsons. On July 1, 1914 there went into effect an act of the legislature of the latter State commonly known as the Yost law. It prohibits, except for medicinal, pharmaceutical, scientific, mechanical or sacramental purposes, the manufacture, sale or offer for sale of intoxicants and the soliciting or receiving of orders for them. It contains many provisions intended to make evasion difficult and dangerous. Penalties are imposed on those who by themselves or in association with others maintain any club-house or other place in which liquor is received or kept for the purpose of use, gift, barter or sale as a beverage, or for distribution or division among the members of any club or association. Section 8 provides in part that—

66 "If any person shall advertise or give notice by signs, bill board, newspapers, periodicals or otherwise * * * of the sale or keeping for sale of liquors, or shall circulate or distribute any price lists, circulars or order blanks advertising liquors, or publish any newspaper, magazine, periodical or other written or printed papers, in which such advertisements or notices are given, or shall permit any such notices, or any advertisement of liquors (including bill boards) to be posted upon his premises, or premises under his control, or shall permit the same to so remain upon such premises, shall be guilty of a misdemeanor."

Another section requires common carriers to keep books in which shall be entered the name of every person to whom liquors are shipped and the amount and kind thereof, together with the date of delivery and by and to whom delivered. Every consignee must in person sign his name to such record.

Within a few weeks after the act went into effect the State thought it had reason to believe that systematic attempts to evade its provisions were being made by various residents of the counties named. It accordingly, as authorized by law, sought the aid of its Circuit Court having jurisdiction in them. It filed a bill against the company, which is the defendant in this cause. It alleged various facts which strongly tended to show that the defendant was delivering great quantities of liquor to many different persons in the town of Thomas and its neighborhood, and that a number of these shipments were of such quantities as to make it highly improbable that they could have been intended solely for the personal use of the consignees. It charged that much of this liquor had been shipped to boarding bosses and other persons to be, in violation of law, by them distributed to their boarders or associates. It said that the defendant was accepting shipments and making deliveries of liquors without exercising due care to ascertain that they were not intended to be used in violation of its laws. In accordance with the prayer of this bill an exparte injunction was issued which, among other things, enjoined the defendant from accept-

67 ing for transportation or delivery to anyone in the three counties in question any liquors unless it had first ascertained "by acting in good faith with due diligence and caution, that such liquors were ordered by the consignees for their lawful personal use without solicitation on the part of the consignor, and that such liquors were offered by the consignor for acceptance and delivery thereof by the said defendant to the consignees for their lawful personal use without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said State". It was further enjoined from delivering to any person in the counties named any liquors procured by the consignee, by him and those associated with him "to be received or kept for the purpose of use or gift as a beverage or for distribution or division among himself and those associating with him, at any place which is kept or maintained by himself or by associating with others, or which he by himself or by association with others in any manner aids, assists or abets in keeping or maintaining". The decree, moreover, prohibited delivery to any person "unless the consignee signs the defendant's liquor record in his own proper person and not in the name of some fictitious person, or otherwise, and then only when the consignee has ordered the same for his personal lawful use with no intention that the liquor so delivered is to be received, possessed, sold or in any manner used in said State of West Virginia in violation of any law thereof."

So soon as this injunction was served upon the defendant it determined to refuse, and thereafter did refuse, to receive any shipments of liquor for transportation to any station in those counties. It says that if it attempted, before accepting such shipments or before making such deliveries, to obtain the information
68 required by the order of the West Virginia court, it would be compelled to employ an army of detectives and inves-

tigators which would cost it far more than the gross freight it would receive for the transportation of the merchandise in question.

The plaintiff is a liquor dealer in Cumberland. It has a large and profitable trade in the portion of West Virginia included within those counties. It is also one of the concerns which the State of West Virginia in its bill of complaint in its own court specially mentioned as shipping liquors in large quantities to the town of Thomas and its neighborhood. Both before and after the going into effect of the Yost act it has through the mails systematically distributed price-lists and solicited orders from residents of that part of the State. With its price-lists and soliciting circulars it sent out order blanks to be filled up and signed by prospective purchasers. In these blanks there is a clause stating that the liquor is intended for the personal use of the individual giving the order.

In August 1914 one Floyd Rosier, a resident of the town of Parsons, by one of these order blanks directed the shipment to him by the plaintiff of four quarts of alcohol and sent a post-office money order for Four Dollars in payment therefor. The plaintiff packed the goods for shipment and tendered them to the defendant for transportation. In accordance with the determination, at which, as before stated, it had arrived, the defendant refused to receive or transport the package and announced that it would refuse to accept any intoxicants for delivery in the territory in which the injunction was operative. The plaintiff thereupon instituted these proceedings. It seeks a mandatory injunction to compel the defendant to transport all liquors ordered, without plaintiff's so-

69 licitation, by Rosier and other customers for their own personal use. At its request, and with the consent of all parties, the State of West Virginia has been made a party to the suit.

Only two questions in this case interest the defendant. It fears that it may be commanded to do something for the doing of which the State court will punish it, and it objects to spending a large sum of money to keep other people from evading the liquor laws of West Virginia.

The voluntary appearance of the State disposes of the former. It was the plaintiff in its own courts. It alone can complain of any disobedience of the decree there passed. It has come into this proceeding and will be bound by whatever is properly done herein.

The expenses to which the defendant may lawfully be put in connection with the shipment and delivery of intoxicants in West Virginia depends upon the degree of care which it may be required to exercise to prevent others using its facilities to break the laws of the State. The controversy between the plaintiff and the State is more far reaching and will be first passed upon.

At the hearing the counsel for the State argued, first, that any shipment into West Virginia by a seller to a buyer of intoxicants was prohibited. Second, that even if that was not so any such shipment was forbidden if the seller had by mail or otherwise solicited the order for it. The first contention was based upon the construction which the State put upon a clause of section 3 of the act, which reads:

"In case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee."

70 The sale of intoxicants in West Virginia is prohibited.

Liquor which a resident of West Virginia orders from out of the State is usually delivered to him by a common carrier. If he has bought it the State says that the law declares that the sale has taken place in the county in which he lives.

Such an interpretation of the statute cannot be accepted. The provision quoted does not make illegal anything not otherwise forbidden. All that it does or was intended to do was to make certain the county in which those who had offended against its other provisions should be prosecuted. The State could not forbid the sale of liquors in Maryland, nor could it say that what by the general law was a completed sale in Maryland should be held to have been made in West Virginia.

American Express Co. v. Iowa, 196 U. S., 133.

If it had wished to keep citizens of West Virginia from obtaining liquor even for their own personal use from outside the State, and had the constitutional right to do so, it might have made it an offense for anyone to order them or to receive or have them. There is nothing in the act, however, to indicate that the State had any objection to anyone obtaining liquor for his own personal use provided he can do so otherwise, than by, within the State, buying or making it.

It follows that liquor brought into West Virginia for the exclusive personal use of the consignee is not intended by anyone interested therein to be received, possessed or used in violation of any law of that State.

Does the fact that such order has been solicited through the mails by a non-resident dealer in liquors make the transaction, which would otherwise have been lawful, illegal? One may solicit in writing as well as by word of mouth. Such a solicitation is made at the place at which in pursuance of the intent of the person making it the written communication is delivered to the person solicited.

United States v. Thayer, 209 U. S., 39.

That the letter is mailed in another State from that at which it is to be delivered does not necessarily prevent the latter state from punishing the sender if it can catch him.

In re Palliser, 136 U. S., 257.

It may be that the right to inflict punishment in such cases may be exercised only when the letter is sent in furtherance of something which the common moral sense of mankind regards as criminal, and does not exist when the thing, aided by the letter, would be in itself indifferent had it not been made criminal by local legislation.

Adams v. The People, 1 N. Y., 175.

Into these niceties it is unnecessary to go. Judge Keller has held that the Yost act reasonably construed does not attempt to prohibit the solicitation of liquor orders by means of communications mailed from without the State.

West Virginia v. Adams Express Co., et al., (as yet unreported.)

It seems only fair to presume that if the legislature had wished to deal with that phase of the problem it would have used language which would have made its purpose plain. I therefore agree that the West Virginia law has not attempted to prohibit such method of soliciting. Whether it has a constitutional right to do so if it chooses need not be here decided and I intimate no opinion, as to it.

The Federal courts are, of course, bound by the construction which those of the State put upon its own statutes. I do not understand, however, that such rule requires national tribunals to accept the issue by a State court of first instance of an injunction upon an ex parte application as an authoritative construction of the applicable State legislation.

72 The defendant in this case makes no objection to the requirement that it shall keep certain kinds of delivery books. It is consequently unnecessary to inquire whether the somewhat narrow construction put upon the Webb-Kenyon act by a number of State courts of last resort, in such cases as *Adams Express Co. v. Commonwealth*, 157 S. W., 908, *Palmer v. Southern Express Co.*, 165 S. W., 236, *Van Winkle v. State*, 91 Atl., 385, or that in effect given to it by Judge Bean in *United States v. Oregon Washington Rail Navigation Co.*, 210 Fed., 378, is the sounder interpretation of the intention of the Congress which passed it. It would be even more beside the mark to pass upon the soundness of plaintiff's contention that a State cannot validly prohibit the possession by an individual of intoxicants for his own personal use. A number of courts of high rank have so held.

State v. Gilman, 33 W. Va., 146;

Commonwealth v. Campbell, 133 Ky., 50;

Eidge v. City of Bessemer, 164 Ala., 599.

On the other hand, it is clearly settled that he may be constitutionally prohibited from either buying or making it within the State. As every State in the Union has the like right, and as it is at least possible that Congress may validly prohibit its importation from abroad, the right, if it exists, may be lawfully made almost impossible of exercise.

In this case nothing need be decided other than that the defendant as a common carrier is bound to receive for shipment, and to transport and deliver in West Virginia, such liquors as are intended solely for the personal use of the consignee, even though the orders for them had been solicited by letters mailed at points outside the State. It has no right to accept for shipment, or to

73 deliver in West Virginia, liquors which are intended by any person interested therein to be used in any way forbidden by the law of that State. It is not bound at its peril to make sure that no liquor transported by it is intended to be used contrary to the State law. It need not create or maintain any special staff of investigators or detectives to aid it in determining such questions. It must, however, act in good faith. Its agents and employees who handle such shipments for it must keep their eyes open and must exercise common sense to prevent it and its instrumentalities being used as aids in violation of the law.

A decree may be drawn in accordance with the conclusions herein stated.

74

Decree.

Filed December 24, 1914.

In the District Court of the United States for the District of Maryland, at Cumberland, Maryland.

No. 3. Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, of Cumberland, Md.,
a Corporation,

vs.

THE AMERICAN EXPRESS COMPANY, an Association Doing Business
in the State of West Virginia.

This cause came on to be heard at the September Term of this court, held in Cumberland, Maryland, upon the bill of complaint, the answer of the defendant, The American Express Company, an association doing business in the State of West Virginia, and the petition of the State of West Virginia, a body politic and a sovereign State, to be made a party defendant herein, and the order of this court making the said State of West Virginia a party defendant, and the testimony and proofs in the case, and was argued by counsel.

It is thereupon, upon consideration of the same, for reasons stated in written opinion, which opinion is marked filed and made a part of the record, this 24th day of December, 1914, ordered, adjudged and decreed by the United States District Court for the District of Maryland, that The American Express Company, defendant herein, its agents, servants, employees and officers, and each of them, be and they are hereby commanded and enjoined to cease refusing to accept for transportation over its express line in due course of business from Cumberland, Maryland, to points of delivery in

75 the Counties of Mineral, Grant and Tucker, in the State of West Virginia, any and all liquors as set forth and described in the bill of complaint, ordered by Floyd Rosier or other customers of The James Clark Distilling Company, plaintiff herein, residing and being in said Counties of West Virginia, for their

own personal use, whether or not said orders of said customers have been solicited by the plaintiff by means of advertisements, price-lists, letters or circulars, sent from places outside of the State of West Virginia to such customers by the plaintiff in the United States mails; and said defendant, its agents, servants, employees and officers, be and they are hereby perpetually enjoined and commanded to accept from the plaintiff as aforesaid all such liquors presented to them by the plaintiff for shipment over its said express line from Cumberland, Maryland, to points in said Counties of Mineral, Grant and Tucker, in the State of West Virginia, and to transport and carry the same in interstate commerce from Cumberland, in the State of Maryland, to all such points on its express line in said Counties of Mineral, Grant and Tucker, in the State of West Virginia, where the defendant maintains a permanent station with a regular agent for the receiving and delivery of merchandise, and for the keeping of a record of the same, as required by the law of the State of West Virginia; and said defendant, its agents, servants, employees and officers, be and they are hereby perpetually commanded to deliver all such liquors presented to it by the plaintiff at Cumberland, over its express line at said points in said three Counties of West Virginia, as aforesaid, to the consignees thereof.

Provided, however, that before the said defendant, The American Express Company, its servants, agents, employees, and officers, shall receive at Cumberland, Maryland, for transportation and delivery in interstate commerce to any of said points in said three Counties in the State of West Virginia, any such aforesaid shipments of liquors to consignees in said three Counties ordering the same, the said defendant, its servants, agents, employees, and officers, shall in good faith and as far as they are reasonably able so to do, ascertain from the shippers of said liquors whether the same are for the personal use of the consignee, or whether they are intended to be used by the consignees for the purpose of selling or giving away, or dividing the same with anyone else who may have an interest therein, or whether said liquors in any way are intended to be used by the consignees, or any person interested therein, in any way in violation of the laws of the State of West Virginia; and shall exercise the same due care in regard to the delivery of the same to any such consignees, and in all things shall carefully scrutinize said shipments of liquor and exercise their common sense to prevent said express line and its facilities from being used in any way as an aid in the shipment of said liquors in violation of the Prohibition Laws of the State of West Virginia; and in case the defendant, its agents, servants, employees, and officers shall be satisfied as aforesaid, that any of said shipments of liquor are not intended for the personal use of the consignee, or are to be used by him or her in any manner in violation of the laws of West Virginia, then said defendant, its agents, servants, employees, and officers shall refuse to accept or deliver the same, as the case may be.

JOHN C. ROSE,
District Judge.

77

Perpetual Injunction.

Issued December 24, 1914.

THE UNITED STATES OF AMERICA,
District of Maryland, To-wit:

The President of the United States of America to American Express Company, a Joint Stock Association formed under the laws of the State of New York:

Whereas, The James Clark Distilling Company, a corporation, duly organized and existing under the laws of the State of Maryland, and a citizen of said State and of the United States, filed its bill of complaint in the District Court of the United States for the District of Maryland, at Cumberland, Maryland, on the 24th day of August, 1914, praying among other things for an injunction perpetually commanding and enjoining the defendant, its servants, agents, employees and officers, and each of them to cease refusing to accept for transportation over its express line in due course of business, from Cumberland, to points of delivery in the Counties of Mineral, Grant and Tucker, State of West Virginia, all liquors ordered by Floyd Rosier or other customers of The James Clark Distilling Company, for their own personal use, and without solicitation on the part of The James Clark Distilling —, as more particularly set forth in said bill of complaint;

And whereas, the said District Court hath, this 24th day of December, 1914, granted an injunction commanding and enjoining you as hereinafter set forth,

You, your agents, servants, employees, and officers and each of them are therefore commanded and enjoined to cease refusing to accept for transportation over its express line in due course of business from Cumberland, Maryland, to points of delivery
78 in the Counties of Mineral, Grant and Tucker, in the State of West Virginia, any and all liquors as set forth and described in the bill of complaint, ordered by Floyd Rosier or other customers of The James Clark Distilling Company, plaintiff herein, residing and being in said Counties of West Virginia, for their own personal use, whether or not said orders of said customers have been solicited by the plaintiff by means of advertisements, price-lists, letters or circulars, sent from places outside of the State of West Virginia to such customers by the plaintiff in the United States mails; and said defendant, its agents, servants, employees, and officers, be and they are hereby perpetually enjoined and commanded to accept from the plaintiff as aforesaid all such liquors presented to them by the plaintiff for shipment over its said express line from Cumberland, Maryland, to points in said Counties of Mineral, Grant and Tucker, in the State of West Virginia, and to transport and carry the same in interstate commerce from Cumberland, in the State of Maryland, to all such points on its express line in

said Counties of Mineral, Grant and Tucker, in the State of West Virginia, where the defendant maintains a permanent station with a regular agent for the receiving and delivery of merchandise, and for the keeping of a record of the same, as required by the law of the State of West Virginia; and said defendant, its agents, servants, employees, and officers, be and they are hereby perpetually commanded to deliver all such liquors presented to it by the plaintiff at Cumberland, over its express line at said points in said three Counties of West Virginia, as aforesaid, to the consignees thereof; Provided, however, that before the said defendant The American

Express Company, its servants, agents, employees, and officers, shall receive at Cumberland, Maryland, for transportation and delivery in interstate commerce to any of said points in said three Counties, in the State of West Virginia, any such aforesaid shipments of liquors to consignees in said three Counties ordering the same, the said defendant, its servants, agents, employees, and officers, shall in good faith and as far as they are reasonably able so to do, ascertain from the shippers of said liquors whether the same are for the personal use of the consignee, or whether they are intended to be used by the consignees for the purpose of selling or giving away, or dividing the same with anyone else who may have an interest therein, or whether said liquors in any way are intended to be used by the consignees, or any person interested therein, in any way in violation of the laws of the State of West Virginia; and shall exercise the same due care in regard to the delivery of the same to any such consignees, and in all things shall carefully scrutinize said shipments of liquor and exercise their common sense to prevent said express line and its facilities from being used in any way as an aid in the shipment of said liquors in violation of the Prohibition Laws of the State of West Virginia, and in case the defendant, its agents, servants, employees, and officers shall be satisfied as aforesaid, that any of said shipments of liquor are not intended for the personal use of the consignee, or are to be used by him or her in any manner in violation of the laws of West Virginia, then said defendant, its agents, servants, employees, and officers shall refuse to accept or deliver the same, as the case may be, under the pains and penalties that may fall thereon. Hereof fail not at your peril.

Witness the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland, the 24th day of December, 1914.

Issued the 24th day of December, 1914.

[SEAL OF COURT.]

ARTHUR L. SPAMER,
Clerk of our said District Court.

81 *Order of Court Directing a Re-argument.*

Filed January 15, 1915.

In the District Court of the United States for the District of
Maryland.

In Equity.

THE JAMES CLARK DISTILLING COMPANY, of Cumberland, Md., a
Corporation,

vs.

AMERICAN EXPRESS COMPANY, a Joint Stock Association Formed
under the Laws of the State of New York.

The court of its own motion having come to the conclusion that there is probable error in the decree entered in the above entitled cause on the 24th day of December, 1914, hereby, this 15th day of January, 1915, orders a re-argument of said matter to be held on Wednesday, January 20th, 1915, at 10 o'clock A. M. in the United States District Court Room, at Baltimore, Maryland.

JOHN C. ROSE,
U. S. District Judge.

82

Final Decree.

Filed January 23, 1915.

District Court of the United States, District of Maryland, at Cumberland, Md.

No. 3. Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, a Corporation,
Complainant,

vs.

AMERICAN EXPRESS COMPANY, a Joint Stock Association, Formed
under the Laws of the State of New York, Defendant.

Decree.

This cause came on to be heard in pursuance of the order for re-argument entered on January 15th, 1915, and all parties being present in open court by their counsel, counsel of complainant objected to the vacation and setting aside of the decree of December 24th, 1914, on the grounds that the constitution and laws of West Virginia as applied to the interstate commerce transactions disclosed in the pleadings and evidence are repugnant to the commerce clause of the Constitution of the United States and the Fourteenth Amendment thereof; and that if the application of said

constitution and laws of West Virginia to such interstate commerce is authorized by the Act of Congress of March 1st, 1913, entitled, "An Act divesting intoxicating liquors of their interstate character in certain cases", that said Act of Congress is repugnant to said commerce clause and the Fifth Amendment of the Constitution of the United States.

83 On consideration whereof it appearing to the court that its decision and decree entered herein on December 24th, 1914, is in conflict with the decision of the United States Circuit Court of Appeals, for the Fourth Circuit, in the case of State of West Virginia, appellant, vs. Adams Express Company, appellee, No. 1325 in said court, a copy of the opinion of the Court of Appeals being filed herewith, it is now ordered that said decree entered herein on December 24th, 1914, be and the same is hereby vacated and set aside. And thereupon this court, in conformity with the said decision of the United States Circuit Court of Appeals for the Fourth Circuit, orders and decrees that the bill of complaint be and the same is hereby dismissed at the costs of the plaintiff. Thereupon came the plaintiff and presented its petition for an appeal from this decree to the Supreme Court of the United States, and its assignment of errors, and said appeal is allowed in open court.

JOHN C. ROSE,
District Judge.

84 United States Circuit Court of Appeals, Fourth Circuit.

No. 1325.

STATE OF WEST VIRGINIA, Appellant,
versus

ADAMS EXPRESS COMPANY, Association, Appellee.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston.

[Argued Dec. 9, 1914. Decided Jan. 13, 1915.]

Before Knapp and Woods, Circuit Judges, and Waddill, District Judge.

Fred O. Blue and Wayne B. Wheeler, for Appellant, and George E. Price and Joseph S. Graydon (Lawrence Maxwell on brief), for Appellee.

WOODS, *Circuit Judge*:

84a The State of West Virginia brought this suit in the Circuit Court of Kanawha County against the Adams Express Company, R. H. Clendenin and Edward Beigel, alleging: that Beigel, a resident of Cincinnati, Ohio, sent through the mails to

many persons in West Virginia curcular letters soliciting the purchase of intoxicating liquors, contrary to the law of the State; that Clendenin, induced by the solicitation, ordered from Beigel one-fourth of a barrel of beer which was carried by the Adams Express Company from Cincinnati to Charleston, West Virginia, and was there held by the carrier ready for delivery when the bill was filed; and that Beigel intends to continue to ship into West Virginia by the defendant Express Company beer on orders so solicited. The breach of duty to the State alleged against the Express Company was its failure to use due diligence to ascertain before carrying the beer whether the contract for its sale was made in pursuance of an illegal scheme of solicitation, and that by delivering the beer, as it intended, it would aid Beigel in his unlawful attempt to make sales in West Virginia, inasmuch as the statute makes the place of delivery the place of sale. Beigel was not served. The relief asked, with which we are now concerned, is that the State

"Be awarded an injunction against the said defendant, the Adams Express Company, restraining it, its agents, employes and representatives from delivering to the defendant R. H. Clendenin the consignment aforesaid of one-fourth barrel of draught beer; and that defendant, the Adams Express Company, its agents, employes and representatives, be enjoined from delivering to the defendant, or to any other person, any shipment of liquors manufactured by the Pabst Brewing Company and handled by said defendant Beigel, or any of his agents, representatives, or employes at any place where said defendant Express Company operates in the State of West Virginia, within the jurisdiction of the court, unless the consignee of any such liquors can show to the satisfaction of the defendant Express Company, its agents representatives and employes, that he without

84b solicitation from said Beigel, or any of his agents, representatives, or employes ordered the consignment of liquors for his own personal lawful use without having received from said Beigel, or any of his agents, representatives or employees, advertisements or letters soliciting orders for liquors, or price lists or order blanks advertising or soliciting from the consignee orders for liquors."

A preliminary order of injunction was made by the State Court, but upon removal of the cause to the District Court for the Southern District the District Judge, on motion of the Adams Express Company, dissolved the injunction and dismissed the bill, holding that the State law could not prevent solicitation through the United States mails for the sale of liquor, and that there is nothing in the Wilson Act or the Webb-Kenyon Act which authorizes the State to interfere with the shipment and delivery of liquors ordered by a citizen of West Virginia for his own personal use from a licensed dealer without the State.

The appeal requires a consideration of the scope and effect of the West Virginia Constitutional and Statute Law and the effect upon it of the Act of Congress of 1 March, 1913, known as the Webb-Kenyon Act.

1. In trying to comprehend the legislative purpose in prohibition statutes it is important to remember that the ultimate end sought in

prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage. The sale being the most usual and obvious means by which drinking is accomplished, legislation is more often directed against the sale. But it is upon the recognized evil of individual consumption as a beverage that the right of a State under its police power rests to enact prohibitive legislation; and in the exercise of that right it cannot be denied that the State may legislate not only against acts which would constitute a sale at common law, but against other acts within its borders, such as deliveries by common carriers, which tend to defeat or weaken its public policy of preventing the consumption of liquor as a beverage.

We are not concerned in this case with the question whether the State Legislature or the State Legislature and the Congress in conjunction can forbid a citizen to drink intoxicating liquors or purchase them in another State and bring them into the State of West Virginia for his own consumption; but with the very different question whether the State may forbid the sale of liquor in its borders and make the delivery by a carrier a sale at the place of delivery; and whether the Congress can prohibit the transportation in the State by the common carrier of liquor so to be delivered contrary to the law of the State. We think it can be demonstrated that this question must be answered in the affirmative—that it can be made perfectly manifest that shipments into the State and deliveries by common carriers, by which liquor dealers outside of prohibition States were enabled to thwart the efforts of State governments to save the people of the State from the liquor evil, have been forbidden by State legislation made valid by the withdrawal of the protection of interstate commerce from such shipments under the Act of Congress known as the Webb-Kenyon Act.

The amendment to the Constitution of the State of West Virginia, known as section 46, ratified in November, 1912, prohibits "the manufacture, sale and keeping for sale" of intoxicating liquors, with exceptions not material here; and it provides that "the Legislature shall, without delay enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section." On 11 February, 1913, the Legislature enacted a statute to take effect 1 July, 1914, which in section three contained this provision:

"Except as hereinafter provided, if any person acting for himself, or by, for or through another shall manufacture or sell or keep, store, offer, or expose for sale; or solicit or receive orders for any liquors or absinthe or any liquors compounded with absinthe, he shall be deemed guilty of a misdemeanor; and any person, except a common carrier, who shall act as the agent or employe of such manufacturer or such seller, or person so keeping, storing, offering or exposing for sale, said liquors, or act as the agent or employe of the purchaser of such liquors, shall be deemed guilty of such manufacturing or selling, keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier, the

sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employe."

2. At the argument it seemed to be conceded that State legislation would be effective to make the place of delivery the place of sale, with respect to transactions within the scope of the State legislative power. The power of the State to enact laws regulating and controlling commercial transactions within its own limits, subject only to the condition that the regulations shall not arbitrarily impair property rights or interfere with interstate commerce, has been affirmed in *Sinnot vs. Davenport*, 63 U. S. 227; *Delamater vs. South Dakota*, 205 U. S. 93, and innumerable other federal and State decisions. "The internal commerce of a State—that is, the commerce that is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the federal government." *Sands vs. Manistee River Improvement Company*, 123 U. S. 288; *Hart vs. State*, 87 Miss. 171, 39 So. 523, 112 84e Am. St. 437. This power includes the regulation of sales and the change of the general rule of the common law, that delivery to the carrier is a completion of the sale, into a general statutory rule as to every sale that it shall not be complete until delivery to the consignee, or into a special statutory rule that the sale of intoxicating liquors shall not be complete until delivery to the consignee, and that the place of delivery shall be the place of sale. The validity of such a special statutory regulation is illustrated in *State vs. Herring*, 145 N. C., 418, 58 S. E. 1007, 122 Amer. St. 461, and *State vs. Patterson*, 134 N. C. 612, 47 S. E. 808.

3. There is nothing in the amendment of the State Constitution that takes away by implication this power of the legislature to provide that the place of delivery shall be the place of sale. It is true that the constitutional amendment prohibits "the manufacture, sale and keeping for sale" of liquors. But it does not indicate a purpose to deprive the legislature of the power to determine what shall be considered the place of sale. Even if it be assumed that the framers of the amendment, in prohibiting the sale of liquors, had in view the general common law rule that the sale was to be considered made out of the State on delivery to the carrier and intended to incorporate that conception of a sale into the prohibition of the organic law of the State as a permanent State policy, that by no means implies an intention to take from the legislature the power to make other regulations and restrictions to be conveniently altered or added to or repealed from time to time as circumstances might require, but not considered proper to be imbedded in the constitution as the permanent law of the State. This obvious and general principle was applied to constitutional and statutory provisions as to the liquor traffic in *State vs. Hooker (Okla.)*, 98 Pac. 964.

4. The point is earnestly pressed that even if it be true
84f that under the statute in West Virginia delivery in any county of the State is a sale in that county, yet, under an exception of the statute, the express company has the right to promote illicit sales by daily carrying liquor to be delivered in the State

in violation of its laws. The section of the statute above quoted does exempt a common carrier from the provision that any person "who shall act as the agent or employee of such manufacturer, or such seller or person so keeping, storing, offering or exposing for sale liquors shall be deemed guilty of such manufacturing or selling, keeping, storing, or exposing for sale as the case may be" and shall be punished as provided by this section. This exemption of the common carrier from punishment by fine and imprisonment for the carriage or storing of liquor cannot by any stretch be held to imply consent by the State that the carrier may engage in the business of promoting the liquor traffic by conveying it to the place of sale. For such action the carrier by reason of the difficulties of its position may well be exempted, as in this instance, from punishment as a criminal the same as if it were a principal in the crime of keeping or selling. But the doctrine is well established that one who either from carelessness or design habitually serves those who are engaged in pursuits either criminal or detrimental to the public interest as established by legislative enactment, should be restrained by injunction from rendering the nefarious service, even if that service be not criminal in the sense that statutory punishment is not prescribed for it, or even if the statute excludes the idea of punishment for it as an active and knowing participation in the principal crime. The exception of the carrier from punishment by fine or imprisonment as an active participant in the crime of selling or keeping or storing, because of the difficulties of its situation, does not at all imply that

84g habitual aid extended to others violating the law shall not be subject to injunction as a nuisance. If the obstruction of commerce be a nuisance subject to the remedy of injunction, as was held in *In Re Debs*, 158 U. S. 564, surely the active perversion of commerce by conveying goods to be delivered in violation of law may be enjoined. The principle, which seems too plain for further elaboration, is thus stated in the case cited:

"Every government, entrusted by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrongdoing to one resulting in injury to the general welfare is often of itself sufficient to give it standing in court."

5. The requirement relied on by the express company that common carriers shall keep books showing the name of the consignee, etc., may better be regarded as a means of gaining information upon which to seek relief against the transportation and delivery by carriers of contraband liquor as distinguished from that to be legitimately used under the exceptions set out in the statute, than as a consent that they should transport and deliver contraband liquor.

6. The right of the State to an injunction against the persistent transportation by the express company of liquor to be delivered in West Virginia, in pursuance of a contract of sale made in another

State, is reinforced by the fact that the express company has transported the liquor which Clendenin was induced to order from Beigel by solicitation through circulars and price lists, expressly forbidden and made criminal by section 8 of the statute, and that the express company intends to continue to transport and deliver for
84*h* Beigel to purchasers in West Virginia liquors which he has contracted to sell, and intends to deliver through express company, on orders obtained by solicitation forbidden by the statute. But as we have endeavored to show, the relief of injunction is not dependent on this consideration.

7. It makes no difference that the United States Mail was used for the solicitation. The Federal Government does not protect those who use its mails to thwart the police regulations of a State made for the conservation of the welfare of its citizens. The use of the mail is a mere incident in carrying out the illegal act, and affords no more protection in a case like this than a like use of the mails to promote a criminal conspiracy, or to perpetrate a murder by poison, or to solicit contributions of office holders in violation of the civil service law, or to obtain goods under false pretenses. In *Re Polliser*, 136 U. S. 257; *U. S. vs. Shayer*, 209 U. S. 39; *Hayner vs. State*, 83 Ohio 178; *State vs. Morrow*, 40 S. C. 221, 18 S. E. 853.

8. The express company further contends that the State is not entitled to an injunction against the delivery in West Virginia of the liquor which it has transported for Biegel, or against its intended transportation and delivery of liquor which Biegel intends to consign to other persons in West Virginia, on the assertion that these transactions are under Federal protection as interstate commerce and beyond the reach of the legislature of the State. This proposition is admitted to be sound, unless the Webb-Kenyon Act removes the protection, and subjects the delivery of liquor in West Virginia to the inhibition of the State legislature, although the contract of sale be made in Ohio for the shipment of liquor to West Virginia.

9. The position is untenable that the Webb-Kenyon Act has no application, and therefore is without efficacy to extend the
84*i* scope of the State legislation to interstate dealings in liquor because that statute was not enacted until 1 March, 1913, after the West Virginia statute had been passed on 11 February, 1913. The point has not been decided by the Supreme Court of West Virginia. There is a dictum in *State vs. Miller*, 63 West Virginia 436, in favor of the position of the express company, where the question was the application of the Wilson Act to West Virginia legislation. But as the court expressly stated the point was not and could not be involved since the State statute under consideration had been re-enacted after the passage of the Wilson Act. But even if this had been a direct decision we do not think it could prevail against the contrary view of the Supreme Court of the United States, for we venture to think the question is not one of the construction of a State statute, but of the force and effect of a Federal statute in a State law and on such an issue the decisions of the Supreme Court of the United States are controlling. That court thus determined

the matter *In Re Rahrer*, 140 U. S. 545; in passing on the effect of the Wilson Bill:

"Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

This principle has been reaffirmed in *Butler vs. Gorely*, 146 U. S. 303, *Ernest vs. Missouri*, 156 U. S. 296; *Central P. C. R. Co. vs. Nevada*, 162 U. S. 512; *Silt vs. Westerberg*, 211 U. S. 31.

This is the Webb-Kenyon Statute including the title:

84j An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases.

"Be it enacted, etc., that the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind, from one State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, from any foreign country into any State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented or other intoxicating liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

10. The terms of the statute are so plain and ambiguous that we are unable to perceive that its interpretation requires any resort to construction. The Wilson Bill withdrew the protection of interstate commerce from liquor and made it subject to the State law only after arrival and delivery to the consignee. But under that statute, after arrival and delivery to the consignee "imported liquor fell within the category of domestic articles of a similar nature." *In Re Rahrer*, *Supra*.

The Webb-Kenyon Act is the result of a growing public conviction that it was an abuse of interstate commerce that even under the Wilson Bill liquor dealers in one State were protected in impairing or defeating the efforts of another State to root out or to minimize the evil of the use of liquor as a beverage. This statute prohibits the shipment or transportation of liquor from one State into another not only when it is intended to be sold in violation of any law of such State, but when it is to be received or pos-

84k sessed or in any manner used in violation of the State law.

This is a direct recognition of the right of the State to prohibit the receipt or delivery as well as the possession and use of liquor, without trespassing upon the power of Congress to regulate interstate commerce. The State of West Virginia has enacted with reference to a contract for the sale of liquor that "the sale thereof

shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee," and it expressly forbids a sale within the State. This makes the receipt or delivery have the effect of a sale and in forbidding the sale it forbids the receipt or delivery, which under the statute is the consummation of the sale. Thus it appears that the transportation and delivery already made in this case and the transportation and deliveries contemplated for the future fall within the express description of the transactions from which the Congress intended to withdraw the protection of interstate commerce. Any other construction would not only distort the language, but continue the obstacles to the enforcement of State prohibition laws which it was the manifest intention of the Congress to remove. The Supreme Court of Kentucky has held that although the State statute expressly prohibits the delivery of liquor by a common carrier and such prohibition is valid as to all intrastate shipments, yet the Webb-Kenyon Act does not permit such prohibition to extend to intrastate commerce where the liquor is for personal use. *Adams Express Company vs. Commonwealth*, 154 Ky. 426, 157 S. W. 908, 47 L. R. A. (N. S.) 342.

11. All other decisions we think are in complete accord with the conclusion we have reached, namely that the Webb-Kenyon Act puts without the protection of interstate commerce liquor shipped into the State to be sold, received, or used, when sale, receipt or use is forbidden by the State law. *Palmer vs. Express Co.*, 84 L. (Tenn.) 165 S. W. 236; *State vs. Doe* (Kansas), 139 Pac. 1169; *State vs. Express Co.* (Ind.), 145 N. W. 451; *United States vs. Oregon-Washington R. & N. Co.*, 210 Fed. 378; *Van Winkle vs. State*, (Del.) 91 Atl. 385; *Ex Parte Peede*, (Texas), 170 S. W., 749; *Southern Express Company vs. State* (Ala.), 66 So. 115; *Amer. Express Co. vs. Beer* (Miss.) 65 So. 575. The general trend of Congressional debate on the bill attributed the same meaning to the act, as did also the opinion of the Attorney General given to the President on the question of its constitutionality. Since delivery by one party is necessary to the receipt by another, if receipt be forbidden by a statute, deliveries might well be enjoined as acts promoting illegal receiving of liquor. Under the West Virginia Statute they are subject of injunction as sales within the State.

12. The constitutionality of the Webb-Kenyon Statute is attacked on the ground that it is an attempt by Congress to confer on State Legislatures the power to regulate interstate commerce. This we think is a complete misapprehension. That the Congress has power to outlaw and exclude absolutely or conditionally from interstate commerce intoxicating liquors or any other deleterious substance has been very often decided. *Ex Parte Rahrer*, *Supra*; *Lottery Case*, 188 U. S. 321; *Hoke vs. U. S.*, 227 U. S. 308; *Hipolite Egg Co. vs. United States*, 220 U. S. 45. The distinction is between things deleterious and things beneficial or innocuous. The power to regulate is the power to make reasonable rules or admission or exclusion. The power to exclude intoxicants absolutely or conditionally does not import the power to exclude sound wheat.

13. The following language of Mr. Justice White in *Vance vs.*

Vandercook, 170 U. S. 438, referring to the regulations of the South Carolina dispensary law, was cited here and has been cited 84*m* elsewhere as giving countenance to the notion that the Congress has no right to legislate against the shipment or transportation of liquor intended for personal use from a license State to a prohibition State.

"On the face of these regulations, it is clear that they subject the constitutional right of the non-resident to ship into the State and of the resident in the State to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges. The right of a citizen of another State to avail himself of interstate commerce cannot be held to be subject to the issuing of a certificate by an officer of the State of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right arises from the Constitution of the United States; it exists wholly independent of the will of either the lawmaking or the executive power of the State; it takes its origin outside of the State of South Carolina and finds its support in the Constitution of the United States."

It is perfectly manifest that this language refers to the constitutional provision giving the Congress control of interstate commerce to the exclusion of the States, and not to the power of the Congress under the authority of the Constitution to exclude absolutely or conditionally deleterious substances.

As to intoxicating liquors, though universally recognized as deleterious, the Congress has not seen fit to exclude them entirely from interstate commerce, but has made the exclusion on this condition, namely, that they shall not be transported by common carriers into particular States when such transportation would be especially injurious to the public interest in that, when they reach the State, they will derange and make inefficacious the police measures for the control of intoxicants which the State has seen fit to adopt. The

84*n* courts can hardly find room to doubt that this qualified exclusion made in aid of the efforts of a number of the States of the Union to combat one of the greatest evils of human life is founded on deep reason and enlightened public policy.

We think that the State of West Virginia is entitled to the order of injunction prayed for and it will be so ordered.

Reversed.

85 *Petition for Appeal and Assignment of Errors.*

Filed January 23, 1915.

District Court of the United States, District of Maryland, at Cum-
land, Maryland.

No. 3. Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, a Corporation, Com-
plainant,

vs.

AMERICAN EXPRESS COMPANY, a Joint Stock Association Formed
Under the Laws of the State of New York, Defendant.*Petition for Appeal and Assignment of Errors.*

Complainant prays an appeal from the decree entered herein on January 23, 1915, to the Supreme Court of the United States and assigns as error that this court erred;

1. In holding that the constitution and laws of West Virginia make the place of delivery in West Virginia the place of sale where a shipment of intoxicating liquor is transported by a common carrier from a point in another state and delivered to the consignee in West Virginia for the personal use of the consignee, in pursuance of a sale made by the shipper to the consignee in such other state.

2. In holding that the constitution and laws of West Virginia prohibit a liquor dealer in a state other than West Virginia from advertising the sale of liquors in such other State to be transported and delivered in pursuance of such sale to the persons to whom such advertisements may come for their personal use; such advertising being carried on by means of the United States mail.

86 3. In holding that the constitution and laws of West Virginia, if they make the place of delivery in West Virginia the place of sale, where a shipment of intoxicating liquors is transported by a common carrier from a point in another state and delivered to the consignee in West Virginia for the personal use of the consignee, in pursuance of a sale made by mail at the point of origin of said shipment in said other state, are not repugnant to the Commerce Clause of the Constitution of the United States and the Fourteenth Amendment thereof.

4. In holding that the constitution and laws of West Virginia, if they prohibit a dealer in a State other than West Virginia from advertising the sale of liquors in said other State to be transported and delivered to the persons to whom such advertisements may come for their personal use; such advertisements being carried on by means of the United States mail, are not repugnant to the Commerce Clause of the Constitution of the United States and the Fourteenth Amendment thereof.

5. In holding that the Act of Congress of March 1, 1913, entitled;

"An Act divesting intoxicating liquors of their interstate character in certain cases," authorized the State of West Virginia to apply its constitution and laws to said interstate commerce in intoxicating liquors for personal use of the consignee in West Virginia.

6. In holding that the Act of Congress of March 1, 1913, entitled; "An Act divesting intoxicating liquors of their interstate character in certain cases," if it authorized the State of West Virginia to apply its constitution and laws to said interstate commerce in intoxicating liquors for the personal use of the consignees in West Virginia is not repugnant to the Commerce Clause of the Constitution of the United States and the 5th Amendment thereof.

87 7. In vacating its decree entered December 24, 1914.

8. In dismissing the bill of complaint.

LAWRENCE MAXWELL,

WALTER C. CAPPER,

Solicitors for Plaintiff.

88 *Order of Court Prescribing Amount of Bond to be Given on Appeal.*

Filed January 23, 1915.

In the District Court of the United States for the District of Maryland.

In Equity.

THE JAMES CLARK DISTILLING COMPANY, of Cumberland, Md.,
a Corporation.

vs.

AMERICAN EXPRESS COMPANY, a Joint Stock Association Formed
Under the Laws of the State of New York, and the State of West
Virginia, a Body Politic and a Sovereign State.

Ordered, by the District Court of the United States for the District of Maryland, this 23rd day of January, 1915, that The James Clark Distilling Company, a corporation, plaintiff in the above entitled cause, give an appeal bond in the penalty of Two Hundred Dollars (\$200.00) for costs on its appeal to the Supreme Court of the United States, from the decree entered this day in said cause.

JAHN C. ROSE,

U. S. District Judge.

89 *Appeal Bond.*

Filed January 26th, 1915.

Know all men by these Presents, That we, The James Clark Distilling Company of Cumberland, Md., as principal, and William A. Buchholtz of Cumberland, Md., as surety, are held and firmly

bound unto The American Express Company and the State of West Virginia in the full and just sum of Two hundred dollars, to be paid to the said American Express Company and the State of West Virginia their certain attorney, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this 26th day of January, in the year of our Lord one thousand nine and fifteen.

Whereas, lately at a District Court of the United States for the District of Maryland in a suit depending in said Court, between the James Clark Distilling Company of Cumberland, Md.; a corporation, plaintiff and American Express Company and the State of West Virginia, defendants a decree was rendered against the said The James Clark Distilling Company, of Cumberland, Md., and the said The James Clark Distilling Company, of Cumberland, Md., having been allowed an appeal from said decree to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said American Express Company and the State of West Virginia citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said the James Clark Distilling Company of Cumberland, Md.,
90 shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of the James Clark Distilling Co. of Cumberland, Md.]

THE JAMES CLARK DISTILLING COM-
PANY OF CUMBERLAND, MD.,

By JNO. KEATING, *Its Vice President.*

WILLIAM A. BUCHHOLTZ,

[SEAL.]

Sealed and delivered in presence of

JNO. KEATING,

Secretary.

WALTER C. CAPPER.

Approved by

JOHN C. ROSE,

U. S. District Judge for the District of Maryland.

91 UNITED STATES OF AMERICA, ss:

To the American Express Company, and the State of West Virginia,
Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal from a decree of the District Court of the United States for the District of Maryland, entered on the 23rd day of January, 1915, in a cause pending

therein wherein The James Clark Distilling Company, a corporation, is plaintiff, and you are defendant to show cause, if any there be, why the decree rendered against the said plaintiff as in the said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John C. Rose, Judge of the said District Court of the United States, this twenty-third day of January, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States District Court Maryland.]

JOHN C. ROSE,
*Judge of the District Court of the United
States for the District of Maryland.*

Attest:

ARTHUR L. SPAMER,
*Clerk District Court of the United
States for the District of Maryland.*

Service of the within Citation acknowledged this 28th day of January, 1915.

THE STATE OF WEST VIRGINIA,
By FRED O. BLUE, *Its Attorney.*
THE AMERICAN EXPRESS COMPANY,
By JOHN PHILIP HILL, *Its Attorney.*

92 *Plaintiff's Præcipe for Record on Appeal.*

Filed February 11th, 1915.

District Court of the United States, District of Maryland, at Cumberland, Maryland.

No. 3. Equity Docket.

THE JAMES CLARK DISTILLING COMPANY, a Corporation, Complainant,

vs.

AMERICAN EXPRESS COMPANY, a Joint-Stock Association Formed under the Laws of the State of New York, Defendant.

Præcipe.

To the Clerk:

Please incorporate into the transcript on appeal, the following portions of the record:

1. Bill of Complaint.
2. Answer of American Express Company.
3. Respondent's Exhibit No. 1.
4. Petition of State of West Virginia to be made a party defendant and Order of Court permitting State of West Virginia to be

made a party defendant unless cause to the contrary be shown as therein set forth.

5. Exhibits Nos. 1 and 2 of the State of West Virginia.

6. Order of Court permitting the State of West Virginia to be made a party defendant.

7. Condensed Statement of Testimony as prepared by Appellants, agreed to by appellees and approved by the Court.

8. Opinion of the Court.

9. Decree.

10. Injunction.

93 11. Order of Court ordering a re-argument of this case.

12. Decree dismissing Bill of Complaint.

12½. Certified copy of the opinion of the United States Circuit Court of Appeals for the Four- Circuit in the State of West Virginia, Appellant, vs. Adams Express Company, Appellee, No. 1325.

13. Petition for Appeal.

14. Assignment of Errors.

15. Order prescribing bond to be given on appeal.

16. Appeal Bond.

17. Citation.

18. Order to transmit Record.

19. Clerk's certificate.

LAWRENCE MAXWELL,
WALTER C. CAPPER,
Attorneys for Plaintiff.

Service of a copy of the foregoing præcipe acknowledged this 8th day of February, 1915.

FRED O. BLUE,
Counsel for the State of West Virginia.

Service of a copy of the foregoing præcipe acknowledged this 10th day of February, 1915.

BENJ. A. RICHMOND,
*Counsel for Defendant, The
Western Maryland Railway Co.*

Service of a copy of the foregoing præcipe acknowledged this 11th day of February, 1915.

JOHN PHILIP HILL,
*Counsel for Defendant, The
American Express Company.*

94

Order to Transmit Record.

And thereupon, it is ordered by the Court here, that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said Supreme Court of the United States, and the same is transmitted accordingly.

Teste:

ARTHUR L. SPAMER, *Clerk.*

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Maryland, To-wit:

I, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the foregoing is a true transcript of the record and proceedings of the said District Court, together with all things thereunto relating in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, this 25th day of February, 1915.

[Seal United States District Court Maryland.]

ARTHUR L. SPAMER, *Clerk.*

95 In the District Court of the United States, for the District of Maryland.

No. —. Equity.

JAMES CLARK DISTILLING COMPANY, of Cumberland, Md., a Corporation,

vs.

AMERICAN EXPRESS COMPANY, a Joint Stock Association.

To the Honorable John C. Rose, Judge of said Court:

The petition of the James Clark Distilling Company in the above entitled cause, respectfully shows:

That this Honorable Court passed a final decree in the above cause on the 23d day of January, 1915, and the plaintiff was allowed an appeal from said decree to the Supreme Court of the United States, provided the record was made up and filed in the Supreme Court of the United States within thirty days from said 23d day of January, 1914.

Your petitioner now says that ever since said 23d day of January, 1915, its attorneys have been constantly engaged in having its appeal in this case perfected, but that on account of the fact that counsel engaged in said case reside a great distance apart, your petitioner's attorneys have been delayed in effecting an agreement among said attorneys as to what should constitute the record, and as to the narrative form to which the testimony should be reduced; that all of said matters have now been agreed upon by counsel, and the Clerk of this Court is engaged in perfecting the transcript in said case, but your petitioner is informed that said Clerk may be unable to have the transcript perfected in time to have the same filed in the Supreme Court of the United States on or before the return day, to-wit the 23d day of February, 1915, and your petitioner therefore respectfully prays the Court to pass an order hereon, extending the time for making up the said record and filing the same

96 with the Clerk of the Supreme Court of the United States, for a period of twenty days from the said 23d day of February, 1915.

And as in duty bound, &c.

LAWRENCE MAXWELL,
WALTER C. CAPPER,

Attorneys for the James Clark Distilling Company.

Upon the foregoing petition it is ordered this 18 day of February, 1915, by the District Court of the United States, for the District of Maryland, that the time allowed the plaintiff in the foregoing cause for having the record of said case made up and filed with the Clerk of the Supreme Court of the United States, be and the same is hereby extended for a period of twenty days, from the 23d day of February, 1915.

JOHN C. ROSE,
District Judge.

97 [Endorsed:] No. 3. Equity. In the District Court of the United States for the District of Maryland. The James Clark Distilling Company, of Cumberland, Md., a Corporation, vs. American Express Company, a Joint Stock Association. Petition and Order of Court. Mr. Clerk: Enter this Order on the minutes at Cumberland. John C. Rose, Judge. Walter C. Capper, Attorney and Counselor at Law. 10 Water Street, Cumberland, Md. Filed 18 February, 1915.

98 Supreme Court of the United States.

No. —.

THE JAMES CLARK DISTILLING COMPANY, of Cumberland, Maryland, a Corporation, Appellant,

vs.

AMERICAN EXPRESS COMPANY, a Joint-Stock Association Formed under the Laws of the State of New York, and the State of West Virginia, Appellees.

Appeal from the District Court of the United States for the District of Maryland, at Cumberland, Maryland.

Stipulation for Reducing the Printed Record.

It is hereby stipulated that in printing the record on appeal, the Clerk may omit pages 41 to 44 inclusive of the typewritten transcript of record, being petitioner's Exhibit No. 2, the injunction order issued out of the Circuit Court of Tucker County, West Virginia, in State of West Virginia vs. American Express Company,

and being a duplication of defendant's Exhibit No. 1 appearing at page 16 of the typewritten record.

LAWRENCE MAXWELL,

Attorney for Appellant.

JOHN PHILIP HILL,

Attorney for American Express Company, Appellee.

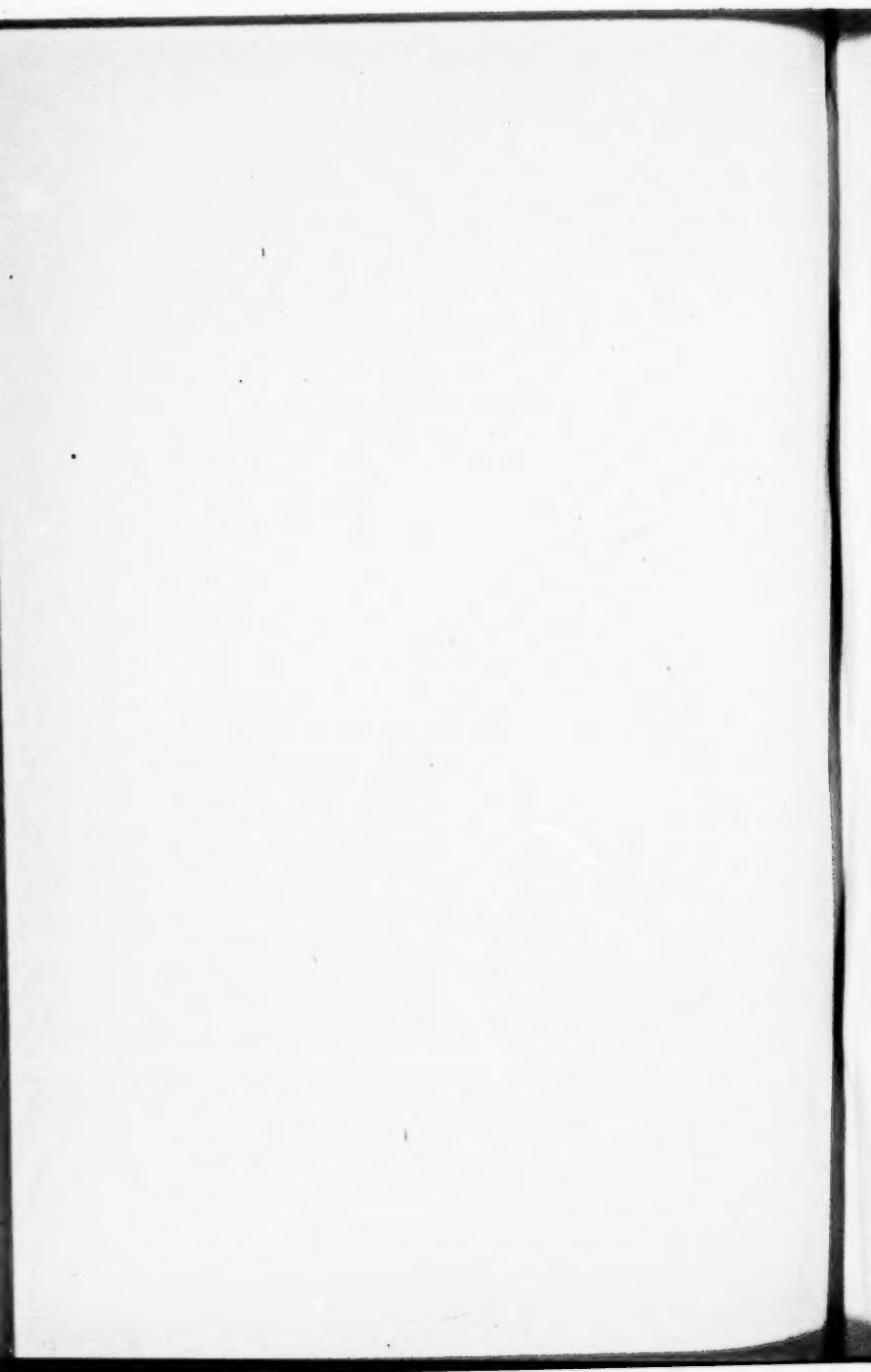
FRED O. BLUE,

Attorney for the State of West Virginia, Appellee.

99 [Endorsed:] Supreme Court of the United States. No. 858/24,602. The James Clark Distilling Company, of Cumberland, Maryland, a corporation, Appellant, vs. The American Express Company, a joint-stock association formed under the laws of the State of New York, and the State of West Virginia, Appellees. Stipulation for Reducing the Printed Record. Office of the Clerk. Received Mar. 15, 1915. Supreme Court U. S. Maxwell & Ramsey, Cincinnati, Ohio.

100 [Endorsed:] File No. 24,602. Supreme Court U. S. October term, 1914. Term No. 858. The James Clark Distilling Company, Appellant, vs. The American Express Company. Stipulation to omit parts of record in printing. Filed March 15, 1915.

[Endorsed on cover:] File No. 24,602. Maryland D. C. U. S. Term No. 858. The James Clark Distilling Company, appellant, vs. The American Express Company and The State of West Virginia. Filed March 5th, 1915. File No. 24,602.



APR 29 1915

JAMES D. MAHER

CL

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 857.

3 75

The James Clark Distilling Company, Appellant,

vs.

The Western Maryland Railway Company, and the
State of West Virginia.

No.

3 76

The James Clark Distilling Company, Appellant,

vs.

The American Express Company and the State of
West Virginia.

**Appeals from the District Court of the United States
for the District of Maryland.**

MOTION TO ADVANCE.

Appellant moves the court to advance the above entitled cases to be heard in connection with Adams Express Company, Plaintiff in error, vs. Kentucky, No. 271, October Term, 1914. The three cases involve the question whether a state is authorized by the act of Congress of March 1, 1913, known as the Webb-Kenyon Law, to prohibit the interstate transportation of liquors for the personal use of the consignee.

An early decision of these cases is important for the following reasons.

The court below in each case on argument and consideration held that the interstate importation of

liquors for personal use into West Virginia was not prohibited and entered a decree to that effect. Thereafter on its own motion the court withdrew said decree and entered the final decree appealed from holding that such traffic was prohibited, in accordance with the opinion of the United States Circuit Court of Appeals for the Fourth Circuit in *State of West Virginia, appellant, vs. Adams Express Company*, 219 Fed. 794. In that case the Circuit Court of Appeals reversed a judgment of the District Court of the United States for the Western District of West Virginia holding that the traffic was not prohibited (*State of West Virginia vs. Adams Express Co.*, 219 Fed. 331). The decision of the United States Circuit Court of Appeals for the Fourth Circuit construing the Webb-Kenyon Law is directly contrary to the decision of the Court of Appeals of Kentucky in *Adams Express Company vs. Commonwealth*, 154 Ky. 426, which involved precisely the same facts as *Adams Express Company vs. Kentucky*, No. 271, October Term, 1914, in this court.

The construction of the Webb-Kenyon Law adopted by the United States Circuit Court of Appeals for the Fourth Circuit is to some extent approved by the Supreme Court of Mississippi (*American Express Co. vs. Beer*, 65 Sou. 575), the Court of General Sessions of Delaware (*State vs. Grier*, 88 Atl. 579), the District Court of the United States for the District of Oregon (*United States ex rel vs. Oregon-Washington Co.*, 210 Fed. 378). On the other hand the following courts in addition to the Court of Appeals of Kentucky hold that under the Webb-Kenyon Law a state is not authorized to prohibit the interstate transportation of liquors for personal use; Supreme Court of Delaware (*VanWinkle*

vs. State, 91 Atl. 385), Supreme Court of Tennessee (Palmer vs. Southern Express Co., 165 S. W. 236), Court of Criminal Appeals of Texas, by a divided court (Ex parte Peede, 170 S. W. 749), District Court of the United States for the District of Minnesota (Hamm Brewing Co. vs. Chicago, R. I. & P. Ry. Co., 215 Fed. 672), and others as noted in our brief.

As a result of this difference of opinion the mutual rights and duties of shippers, railroads and express companies are in doubt, and interstate traffic is disturbed in West Virginia and elsewhere. Interstate carriers in West Virginia are defendants in a number of injunction suits brought by the State in local courts and have suspended traffic by reason of temporary injunctions obtained ex parte. In Kentucky and elsewhere the interstate carriers and their agents have been subjected to numerous criminal prosecutions.

For these reasons we respectfully submit that the cases be advanced.

Lawrence Maxwell,
Walter C. Capper,
J. Philip Roman,
Counsel for Appellant.

I acknowledge service of the foregoing motion and notice that it will be submitted on Thursday, April 29, 1915.

Fred O. Blue,
Counsel for the State of West Virginia.

I consent to the granting of the foregoing motion.
Benj. A. Richmond,
Counsel for Western Maryland Railway Company.
John Philip Hill,
Counsel for American Express Company.

FILED

JUN 14 1915

JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1914.

No. [REDACTED]

3 [REDACTED] 75

The James Clark Distilling Company, Appellant,

vs.

The Western Maryland Railway Company and The
State of West Virginia.

No. [REDACTED]

384 76

The James Clark Distilling Company, Appellant,

vs.

The American Express Company and The State of
West Virginia.

Appeals from the District Court of the United States
for the District of Maryland.

ADDITIONAL LEGISLATION.

Since the submission and argument of these cases
the Legislature of West Virginia on May 24, 1915, at
an extraordinary session, passed the following statute
which will take effect ninety days after its passage:

A Bill to amend chapter thirteen, acts of the legis-
lature of one thousand nine hundred and thirteen, as
amended by chapter seven, acts of the legislature of
one thousand nine hundred and fifteen, regular session,

CLERK

JAMES D. MAHER

JUN 14 1915

relating to prohibiting the manufacture, sale and keeping for sale of intoxicating liquors and the enforcement of the amendment of section forty-six, article six of the state constitution, ratified on the fifth day of November, one thousand nine hundred and twelve, by enacting one additional section thereto, to be numbered section thirty-four, and to be part of said act.

Be it enacted by the Legislature of West Virginia:

That chapter thirteen, acts of the legislature of one thousand nine hundred and thirteen, as amended by chapter seven, of the acts of the legislature of one thousand nine hundred and fifteen, regular session, relating to prohibiting the manufacture, sale and keeping for sale, of intoxicating liquors and the enforcement of the amendment of section forty-six of article six of the state constitution, ratified on the fifth day of November, one thousand nine hundred and twelve, be amended by enacting, as additional thereto, one section, as part thereof, numbered thirty-four, as herein set out.

“Sec. 34. It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common, or other carrier. It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common, or other carrier in this state. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate, as well as intrastate, shipments or carriage. Any per-

ADVANCE COPY OF AN ACT
OF THE
LEGISLATURE OF WEST VIRGINIA
SECOND EXTRAORDINARY SESSION, 1915.

Being Senate Bill No. 6, Originating in Select Committee

[Passed May 24, 1915. In effect ninety days from passage. Approved by the Governor May 29, 1915.]

AN ACT to amend chapter thirteen, acts of the legislature of one thousand nine hundred and thirteen, as amended by chapter seven, acts of the legislature of one thousand nine hundred and fifteen, regular session, relating to prohibiting the manufacture, sale and keeping for sale of intoxicating liquors and the enforcement of the amendment of section forty-six, article six of the state constitution, ratified on the fifth day of November, one thousand nine hundred and twelve, by enacting one additional section thereto, to be numbered section thirty-four, and to be part of said act.

Be it enacted by the Legislature of West Virginia:

That chapter thirteen, acts of the legislature of one thousand nine hundred and thirteen, as amended by chapter seven, of the acts of the legislature of one thousand nine hundred and fifteen, regular session, relating to prohibiting the manufacture, sale and keeping for sale, of intoxicating liquors and the enforcement of the amendment of section forty-six of article six of the state constitution, ratified on the fifth day of November, one thousand nine hundred and twelve, be amended by enacting, as additional thereto, one section, as part thereof, numbered thirty-four, as herein set out.

Sec. 34. It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common, or other carrier. It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common, or other carrier in this state. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate, as well as intrastate, shipments or carriage. Any person violating this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than two hundred dollars, and in addition thereto may be imprisoned not more than three months; *provided, however*, that druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in sections four and twenty-four.



West Virginia Prohibition Law.

[Including Amendments Made by Legislature of 1915.]

AN ACT to prohibit the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, porter, ale, beer or any intoxicating drink, mixture or preparation of like nature, except the manufacture, sale and keeping for sale for medicinal, pharmaceutical, mechanical, sacramental or scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes as regulated and provided for by this act; and to enforce the amendment of section forty-six of article six of the state constitution, ratified on the fifth day of November, one thousand nine hundred and twelve; and making the state tax commissioner *ex officio* state commissioner of prohibition, and defining his duties; and providing for the enforcement of this act and prescribing penalties for violations thereof.

Be it enacted by the Legislature of West Virginia:

Sec. 1. The word "liquors" as used in this act shall be construed to embrace all malt, vinous or spirituous liquors, wine, porter, ale, beer or any other intoxicating drink, mixture or preparation of like nature; and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this act; and all liquids, mixtures or preparations, whether patented or not, which will produce intoxication, and all beverages containing so much as one-half of one per centum of alcohol by volume, shall be deemed spirituous liquors, and all shall be embraced in the word "liquors," as hereinafter used in this act.

Sec. 2. Except as hereinafter provided, the manufacture, sale, keeping or storing for sale in this state, or offering or exposing for sale of liquors or absinthe or any drink compounded with absinthe are forever prohibited in this state, except liquors manufactured prior to July first, one thousand nine hundred and fourteen, and stored in United States bonded warehouses in the custody of the United States collector of internal revenue, and the said liquors when tax paid and in transit from such warehouses to points outside of this state.

Sec. 3. Except as hereinafter provided, if any person acting for himself, or by, for or through another shall manufacture or sell or keep, store, offer or expose for sale; or solicit or receive orders for any liquors, or absinthe or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor for the first offense hereunder, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars, and imprisoned in the county jail not less than two nor more than six months; and upon conviction of the same person for the second offense under this act, he shall be guilty of a felony and be confined in the penitentiary not less than one nor more than five years; and it shall be the duty of the prosecuting attorney in all cases to ascertain whether or not the charge made by the grand jury is the first or second offense; and if it be a second offense, it shall be so stated in the indictment returned, and the prosecuting attorney shall introduce the record evidence before the trial court of said second offense, and shall not be permitted to use his discretion in charging said second offense, or in introducing evidence and proving the same on the trial; and any person, except a common carrier, who shall act as the agent or employee of such manufacturer or such seller, or person so keeping, storing, offering or exposing for sale said liquors, or act as the agent or employee of the purchaser of such liquors, shall be deemed guilty of such manufacturing or selling, keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment or delivery of such liquors is made by a common, or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employe.

An indictment for any first offense under this section shall be sufficient if in the form or effect following:

State of West Virginia,

County of.....to-wit:

In the Circuit Court of.....County:

The grand jurors in and for the body of the said county of, upon their oaths do present that A. B., within one year next prior to the finding of this indictment, in the said county of, did unlawfully manufacture, sell, offer, keep, store and expose for sale and solicit and receive orders for liquors, and absinthe and drink compounded with absinthe, against the peace and dignity of the state.

Sec. 4. The provisions of this act shall not be construed to pre-

vent any one from manufacturing, for his own domestic consumption wine or cider; or to prevent the manufacture from fruit grown exclusively within this state of vinegar and non-intoxicating cider for use or sale; or to prevent the manufacture and sale at wholesale to druggists only of pure grain alcohol for medicinal, pharmaceutical, scientific and mechanical purposes, or wine for sacramental purposes by religious bodies; or to prevent the sale and keeping and storing for sale by druggists of pure grain alcohol for mechanical, pharmaceutical, medicinal and scientific purposes, or of wine for sacramental purposes, by religious bodies, or any United States pharmacopoeia or national formulary preparation in conformity with the West Virginia pharmacy law, or any preparation which is exempted by the provisions of the national pure food law, and the sale of which does not require the payment of a United States liquor dealer's tax. But no druggist shall sell any such grain alcohol except for medicinal, scientific, pharmaceutical and mechanical purposes, or wine for sacramental purposes, except as hereinafter provided, and the same shall not be sold by such druggist for medicinal purposes, except upon a written prescription of a physician of good standing in his profession and not of intemperate habits, or addicted to the use of any narcotic drug, prescribing the amount of alcohol, the disease or malady for which it is prescribed, and how it is to be used, the name of the person for whom prescribed, the number of previous prescriptions given by such physician to such person within the year next preceding the date of such prescription, and stating that the same is absolutely necessary for medicine, and not to be used as a beverage, and that such physician, at the time such prescription was given, made a personal examination of such person, and that such person is known to such physician to be of temperate habits and not addicted to the use of any narcotic drug, and only one sale shall be made upon such prescription, and such prescription shall be at all times kept on file by such druggist and open to the inspection of all state, county and municipal officers. It shall be the duty of such druggist to register in a book kept for that purpose all prescriptions from physicians mentioned in this section, stating the name of the party for whom prescribed, the date of the prescription, the name of the physician by whom the prescription is issued, the quantity of such alcohol and the use for which prescribed, and such record shall at all times be open to the same inspection as such prescriptions.

It shall be lawful for a druggist to sell grain alcohol for pharmaceutical, scientific and mechanical purposes, or wine for sacramental purposes by religious bodies, only to any person, not a minor, and who is not of intemperate habits, or addicted to the use of narcotic drugs, who shall, at the time and place of such sale, make an affidavit in writing signed by himself before such druggist, or a registered pharmacist at the time and place in the employ of such druggist, stating the quantity and the time and place and fully for what purpose and by whom such alcohol or wine is to be used; that affiant is not of intemperate habits or addicted to the use of any narcotic drug; and that such alcohol or wine is not to be used as a beverage, or for any purpose other than that stated in such affidavit. Such affidavit shall be filed and preserved by such druggist and be subject to inspection at all times by any state, county or municipal officer, and a record thereof made by such druggist in the record book mentioned in this section, showing the date of the affidavit, by whom made, the quantity of such alcohol, or wine, and when, where, for what purpose and by whom to be used. Only one sale shall be made upon such affidavit, and only in the county where the same is made, and no greater quantity than is therein specified. For the purpose of this act, any druggist or registered pharmacist making such sale shall have authority to administer such oath.

If any druggist, owner of a drug store, registered pharmacist, clerk or employe shall upon such prescription or affidavit, or otherwise, knowingly sell or give any such alcohol or wine to any person who is of intemperate habits or addicted to the use of any narcotic drug, or knowingly sell or give the same to any one to be used for any purpose other than that named in said affidavit or prescription, or who shall sell or give away any liquors without such affidavit or prescription, he shall be deemed guilty of a misdemeanor and punished by fine of not less than one hundred nor more than five hundred dollars and confined in the county jail not less than thirty days nor more than six months. In any prosecution against a druggist, owner of a drug store, registered pharmacist, clerk or employe, for selling or giving liquor contrary to law, if a sale or gift be proven, it shall be presumed that the same was unlawful in the absence of satisfactory proof to the contrary and the presentation of such prescripition or affidavit by the defendant at the time of the trial for such sale or gift, shall be sufficient to rebut the presumption arising from the proof of such sale

or gift. *Provided*, the jury shall believe, from all the evidence in the case, that such sale or gift was made in good faith under the belief that such prescription or affidavit and statements therein were true; and, *provided, further*, that such druggist, owner of a drug store, registered pharmacist, clerk or employe shall have complied with all other provisions of this act relating to the sale or gift.

An indictment against any druggist, registered pharmacist, clerk or employe, for any offense committed under the provisions of this section, shall be sufficient, if in the form and effect following:

State of West Virginia,

County of.....to-wit:

In the Circuit Court of said County:

The grand jurors in and for the body of the said county of, upon their oaths do present that A. B., within one year next prior to the finding of this indictment, in the said county of.....did unlawfully sell, give, offer, expose, keep and store for sale and gift, liquors, against the peace and dignity of the state.

Sec. 5. If any person who is of intemperate habits or addicted to the use of any narcotic drug shall make the affidavit mentioned in the preceding section, or if any person making such affidavit shall use as a beverage, or for any purpose, or at any place other than that stated in such affidavit, or shall knowingly permit another to do so, said alcohol or wine, or any part thereof, or shall knowingly make any false statement in such affidavit, he shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than one hundred nor more than five hundred dollars, and be confined in the county jail not less than two nor more than six months for the first offense hereunder; and for the second offense he shall be deemed guilty of a felony and punished by confinement in the penitentiary not less than one nor more than five years.

And if any physician who is not in good standing in his profession or who is of intemperate habits, or who is addicted to the use of any narcotic drug, shall issue any such prescription as is mentioned in the last preceding section; or if any physician shall issue such prescription without, at the time, making a personal examination of the person for whom the liquor is prescribed, or shall prescribe for any person who is in the habit of drinking to intoxication and whom he knows, or has reason to believe is in the

habit of drinking to intoxication, or shall give such prescription and make the statements therein required, or any part thereof, falsely, he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred nor more than five hundred dollars and imprisoned in the county jail not less than thirty days nor more than six months, and in addition thereto, for the first offense under this statute, the court may, in its discretion, suspend the license of such physician for a period of six months and for each offense thereafter the court shall suspend such license for a period of six months.

Sec. 6. Every person who shall directly or indirectly keep or maintain by himself or by associating with others, or who shall in any manner aid, assist or abet in keeping or maintaining any club house, or other place in which any liquor is received or kept for the purpose of use, gift, barter or sold as a beverage, or for distribution or division among the members of any club or association by any means whatsoever; and every person who shall use, barter, sell or give away, or assist or abet in bartering, selling or giving away any liquors so received or kept, shall be deemed guilty of a misdemeanor and upon conviction thereof be punished by fine of not less than one hundred nor more than five hundred dollars and by imprisonment in the county jail not less than thirty days nor more than six months; and in all cases the members, share-holders or associates in any club or association mentioned in this section, shall be competent witnesses to prove any violations of the provisions of this section, or of this act, or of any fact tending thereto; and no person shall be excused from testifying as to any offense committed by another against any of the provisions of this act by reason of his testimony tending to criminate himself, but the testimony given by such person shall in no case be used against him.

Sec. 7. It shall be unlawful for any person to keep or have, for personal use or otherwise, or to use, or permit another to have, keep or use, intoxicating liquors at any restaurant, store, office building, club, place where soft drinks are sold (except a drug store may have and sell alcohol and wine as provided by sections four and twenty-four), fruit stand, news stand, room, or place where bowling alleys, billiard or pool tables are maintained, livery stable, boat house, public building, park, road, street or alley. It shall also be unlawful for any person to give or furnish to another intoxicating liquors, except as otherwise hereinafter provided in this section. Any one violating

this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars, nor more than five hundred dollars, and be imprisoned in the county jail not less than two nor more than six months; *provided, however*, that nothing contained in this section shall prevent one, in his home, from having and there giving to another intoxicating liquors when such having or giving is in no way a shift, scheme or device to evade the provisions of this act; but the word "home" as used herein, shall not be construed to be one's club, place of common resort, or room of a transient guest in a hotel or boarding house. And, *provided, further*, that no common carrier, for hire, nor other person, for hire or without hire, shall bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in sections four and twenty-four; and, *provided, further, however*, that in case of search and seizure, the finding of any liquors shall be *prima facie* evidence that the same are being kept and stored for unlawful purposes. [Amendment of Legislature of 1915.]

Sec. 8. If any person shall advertise or give notice by signs, bill board, newspapers, periodicals or otherwise for himself or another of the sale or keeping for sale of liquors, or shall circulate or distribute any price-lists, circulars or order blanks advertising liquors or publish any newspaper, magazine, periodical or other written or printed papers, in which such advertisement or notices are given, or shall permit any such notices, or any advertisement of liquors (including bill boards) to be posted upon his premises, or premises under his control, or shall permit the same to so remain upon such premises, he shall be guilty of a misdemeanor and be fined not less than one hundred nor more than five hundred dollars.

Sec. 9. Every justice of the peace and every circuit, criminal or intermediate court, or the judges thereof in vacation, and every mayor of any city, town or village, upon information made under oath or examination that any person is manufacturing, selling, offering, or exposing, keeping or storing for sale or barter, contrary to law, any liquors, or that the affiant has cause to believe and does believe that such liquors so manufactured, sold, offered, kept or stored for sale or barter in any house, building or other place named therein, contrary to the provisions in this act, shall

issue his warrant requiring the person suspected to be brought before him for examination, or the said house, building or other place to be searched, and the parties found therein to be arrested and brought before him as aforesaid; and requiring the officer to whom it is directed to summon such witnesses as shall be therein named, or whose names are endorsed thereon to appear and give evidence on the examination, and in the same warrant shall require the officer to whom it is directed to seize and hold all liquors found therein, also vessels, bar fixtures, screens, glasses, bottles, jugs and other appurtenances apparently used in the sale, keeping or storing of such liquors contrary to law.

Sec. 10. If, upon examination of such person, it shall appear to such justice, court, judge or mayor, that there is probable cause to believe him guilty of the offense charged, the accused shall be required to enter into a recognizance, with sufficient securities, in the sum of not less than five hundred dollars, to appear before the next term of the circuit or criminal or intermediate court of the county having jurisdiction, to answer an indictment if one be preferred against him; and upon his failure to enter into such recognizance, the justice, court, judge or mayor shall commit him to jail to answer such indictment. All material witnesses shall also be recognized with or without sureties, as such justice, court, judge or mayor may deem proper, to appear before the grand jury at the next term of such court and give evidence against the accused, and such justice, court, judge or mayor shall require the accused to give bond with sufficient security in the sum of five hundred dollars conditioned that he will not violate any of the provisions of this act during the time intervening between the date of such bond and the adjournment of the next grand jury term of said circuit or criminal or intermediate court of the county; and upon his failure to give such bond, the justice, court, judge or mayor shall commit him to jail until such bond is given or until he is discharged therefrom by the circuit or intermediate court of the county.

Sec. 11. Whenever liquors shall be seized in any room, building or place which has been searched under the provisions of this act, the finding of such liquors in such room or of a government license therein shall be *prima facie* evidence of the unlawful selling, and keeping and storing for sale of the same by the person, or persons, occupying such premises, or by any person named in any government license posted in such room, or his associates,

agents or employes thereunder, and the proprietor or other persons in charge of the premises where such liquor was found, or who is so named in such government license, and his associates, shall be subject to trial by due process of law on the charge of selling or keeping or storing for sale unlawfully such liquor, under the indictment and form prescribed in section three of this act, and upon his conviction of selling, offering, storing or exposing for sale such liquor unlawfully, the liquor found upon said premises shall at once be publicly destroyed by some responsible person to be appointed by the court.

Sec. 12. If in such house, building or place, as is hereinbefore mentioned, the sale, offering, storing or exposing for sale of liquors is carried on clandestinely, or in such manner that the person so selling, offering, exposing, keeping or storing for sale, cannot be seen or identified by the officer or officers charged with the execution of a warrant issued under sections ten and eleven of this act, any such officer may, whenever it is necessary for the arrest or identification of the person so offending, or the seizing of such liquor, break open and enter such house, building or place.

Sec. 13. The payment of the special tax required of liquor dealers by the United States by any person, or persons other than druggists, within the state, shall be *prima facie* evidence that such person, or persons, are engaged in keeping and selling, offering and exposing for sale, liquors contrary to the laws of this state, and a certificate from the collector of internal revenue, his agents, clerks or deputies, showing the payment of such tax, and the name or names of person to whom issued, and the names of the person or persons, if any, associated with the person to whom such tax receipt is issued, shall be sufficient evidence of the payment of such tax, and of the association of such persons for the selling and keeping, offering and exposing for sale of liquors contrary to the provisions of this act in all trials or legal inquiries.

Sec. 14. All houses, boat houses, buildings, club rooms and places of every description, including drug stores, where intoxicating liquors are manufactured, stored, sold or vended, given away, or furnished contrary to law (including those in which clubs, orders or associations sell, barter, give away, distribute or dispense intoxicating liquors to their members, by any means or device whatever, as provided in section six of this act) shall be held, taken and deemed common and public nuisances. And any person who shall maintain, or shall aid or abet, or knowingly be associated with others in maintaining such common

and public nuisance, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months for each offense, and judgment shall be given that such house, building or other place, or any room therein, be abated or closed up as a place for the sale or keeping of such liquors contrary to law, as the court may determine.

Sec. 15. The state tax commissioner shall be *ex-officio* state commissioner of prohibition. Wherever the word "commissioner" is used in this act, it shall mean and be taken to mean the state commissioner of prohibition.

Sec. 16. It shall be the duty of the commissioner, his deputies and agents, to superintend the enforcement of all provisions of this act, and of laws of this state affecting the manufacture, sale, keeping, exposing or offering for sale, or giving or soliciting or receiving orders for liquors, or laws connected in any way with the liquor traffic, to diligently inform themselves of all violations of such laws and either make report thereof to the prosecuting attorney of the proper county, who shall forthwith prosecute the same as provided by law, or said commissioner, his agents or deputies, shall make complaint of any violations of any such laws before the proper court or committing justice, and conduct the prosecution thereof in any court in the state having jurisdiction of such matters; and for the purpose of enforcing such laws, the said commissioner, his agents and deputies, shall have all the powers now vested in the prosecuting attorneys of this state and the attorney general thereof, and of sheriffs, their deputies, and constables and police officers of the state. *Provided*, that nothing in this act shall be construed to take from such prosecuting attorneys or the attorney general, or his assistants, any of the powers now conferred upon them by law, except as herein provided, or to relieve any of the said officers from any duty imposed upon him by any statute of this state.

Sec. 17. The commissioner, his agents and deputies, and the attorney general, prosecuting attorney, or any citizen of the county where such a nuisance as is defined in section fourteen of this act exists, or is kept or maintained, may maintain a suit in equity in the name of the state to abate and perpetually enjoin the same, and courts of equity shall have jurisdiction thereof. The injunction shall be granted at the commencement of the action and no bond shall be required.

It shall not be necessary for the court to find that the premises involved were being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the bill are true, the court shall order that no liquors shall be sold, bartered, given away, distributed, dispensed or stored in such house, building, boat house, club room or other place, nor in any part thereof, for a period of not to exceed one year in the discretion of the court from and after such finding, in case of a drug store; in other cases the order for abatement shall be perpetual.

Any person violating the terms of any injunction granted in proceedings hereunder shall be punished for contempt summarily by the court without the impanelling of any jury to try the same, by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment in the county jail not less than thirty days nor more than six months, in the discretion of the court or judge thereof in vacation. In case decree is rendered in favor of the plaintiff in any action brought under the provisions of this section, the court entering the same shall also enter decree for a reasonable attorney's fee in such action in favor of the plaintiff against the defendants therein, which attorney's fee shall be taxed and collected as other costs therein, and when collected paid to the attorney, or attorneys of the plaintiff therein.

Sec. 18. In addition to the penalties prescribed for violation of any of the provisions of sections two to sixteen, inclusive, of this act, the court may in its discretion, when such conviction is had, require the defendant to execute bond with good security to be approved by the court or clerk thereof, in the penalty of one thousand dollars, conditioned not to violate any of the provisions of any of said sections for the term of two years, and in default of such bond may commit the defendant to jail for said term of two years, unless such bond be sooner given.

Sec. 19. All express companies, railroad companies and transportation companies within this state are hereby required to keep books in which shall be entered immediately upon receipt thereof the name of every person to whom liquors are shipped; the amount and kind received; the date when delivered, and by whom, and to whom delivered; after which record shall be a blank space, in which the consignee shall be required to sign his name in person to such record, which book shall be open to the inspection of any state, county or municipal officer of this state, at any time during business hours of the company; except that in the absence or sickness of a duly licensed druggist, having

authority to sell pure grain alcohol and wine for the purposes prescribed by law, a registered pharmacist in the employ of such druggist, duly designated by such druggist, in writing personally signed by him, to the agent of the transportation company, may sign such druggist's name to the record of shipments of alcohol for medicinal, pharmaceutical, scientific and mechanical purposes, or wine for sacramental purposes by religious bodies, such registered pharmacist being required to write immediately beneath such druggist's name his own name and his connection with such druggist. Such books shall constitute *prima facie* evidence of the facts therein stated, and be admissible as evidence in any court in this state having jurisdiction, or in any manner empowered with the enforcement of the provisions of this act. Any employe or agent of any express, railroad company or transportation company knowingly failing or refusing to comply with the provisions of this section, shall be guilty of a misdemeanor and punished by a fine of not less than fifty nor more than one hundred dollars, and may be imprisoned in the county jail not less than thirty days nor more than six months. *Provided, however, that nothing herein contained shall permit, or be construed as permitting or authorizing, any common carrier or transportation company to bring or carry into this state, or carry from one place to another within the state, intoxicating liquors for another, even when intended for personal use, other than pure grain alcohol and wine, and such preparations for druggists as may be sold by them for the special purposes and in the manner set forth in sections four and twenty-four. [Amendment of Legislature of 1915. In effect February 20, 1915.]*

Sec. 20. Any citizen or organization within this state may employ an attorney to assist the prosecuting attorney to perform his duties under this act, and such attorney shall be recognized by the prosecuting attorney and the court as associate counsel in the proceedings; and no prosecution shall be dismissed over the objection of such associate counsel until the reasons of such prosecuting attorney for such dismissal, together with the objections thereof of such associate counsel, shall have been filed in writing, argued by counsel and fully considered by the court.

Sec. 21. The prosecuting attorney of any county, with the approval of the governor, or of the court of the county vested with authority to try criminal offenses, or of the judge thereof in vacation, may, within his discretion, offer rewards for the apprehension of persons charged with crime, or may expend money for the detection of crime. Any money expended under this section shall, when ap-

proved by the prosecuting attorney, be paid out of the county fund in the same manner as other county expenses are paid.

Sec. 22. In all cases arising under this statute the state shall have the right to appeal.

Sec. 23. This entire act shall be deemed an exercise of the police powers of the state for the protection of public health, peace and morals, and all of its provisions shall be liberally construed for the attainment of that purpose.

Sec. 24. The manufacture of alcohol, wine and liquors, and the sale of the same by the manufacturer and by wholesale druggists, shall be under the supervision of the commissioner and under such rules and regulations as he may from time to time prescribe.

Sec. 25. Paragraphs b, c, d, h and y of section one, and section ten, section forty, section sixty-six, section seventy-four, section seventy-seven, sections eighty-seven, eighty-eight, eighty-eight-a, section ninety-two and section one hundred and twenty-a of the code of one thousand nine hundred and six, as amended and re-enacted by chapter eighty-two of the acts of one thousand nine hundred and seven, and sections eighty-seven, eighty-seven-a and section one hundred and twenty-a of chapter sixty-eight of the acts of one thousand nine hundred and nine, and all other acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Sec. 26. All of the provisions of this act shall take effect on the first day of July, one thousand nine hundred and fourteen.

Sec. 27. If any corporation or association shall violate any of the provisions of this act, any officer, agent or employe thereof acting for it in any such unlawful act, or authorizing the same to be done, shall be personally guilty thereof the same as though such officer, agent or employe himself had committed the offense, and shall be subject to all of the fines, penalties and imprisonments therefor. [Amendment of Legislature of 1915.]

Sec. 28. It shall be unlawful for any person to give, under the proviso in section seven, or otherwise, intoxicating liquors to any minor, person of intemperate habits, or one who is addicted to the use of any narcotic drug. If any person shall violate the provisions of this section he shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred dollars, nor more than five hundred dollars, and imprisoned in the county jail not more than six months. [Amendment of Legislature of 1915.]

Sec. 29. If any county, district or municipal officer, or any municipal police, shall fail, refuse or neglect to discharge any duty im-

posed upon him by law, prohibiting the manufacture, sale, keeping and storing for sale of intoxicating liquors, he shall be removed from office in the manner provided in this section. Such removal shall be made by the circuit court of the county wherein such officer resides. The charges against any such officer shall be reduced to writing, and entered of record by the court, and a summons shall thereupon be issued by the clerk of such court, containing a copy of the charges, and requiring the officer named therein to appear and answer the same on a day to be named therein, which summons may be served in the same manner as a summons commencing an action may be served, and the service must be made at least five days before the return day thereof. And the court itself shall, without a jury, hear the charges, and upon satisfactory proof thereof, remove any such officer from the discharge of the duties of his office, and place the records, papers and property of his office in the possession of some other officer or person for safekeeping until the vacancy is filled. Any vacancy created under this section shall be filled in the manner required by law as to county and district officers, and in the manner prescribed by the ordinances of the municipality. Any citizen of the county, district or municipality, as the case may be, or the commissioner of prohibition, may prefer and prosecute to final judgment charges for removal against any of the officers, including municipal police, mentioned in this section. The word "officer", as used herein, shall include and embrace municipal police. Either party shall have the right of appeal to the supreme court of appeals of the state from the judgment of the circuit court. [Amendment of Legislature of 1915.]

Sec. 30. Whenever it shall be made to appear to any criminal or circuit court, having the trial of offenses under this act, that the state cannot have a fair and impartial trial by jury in the county wherein an indictment has been returned, charging an offense under this act, the court shall enter an order of record to such effect. In said order the court shall fix a day for the trial of the accused, and in such order shall be indicated the county from which jurors shall be drawn to try the accused, and the number of jurors to be drawn. An attested copy of such order shall be certified to the judge of the circuit court of the county designated, and thereupon the judge of such circuit court shall, by order, direct that a jury be drawn, in the manner provided by law for the drawing of petit jurors in his county, and proceedings respecting the drawing of such jurors, including the names of the jurors, shall be certified by the

clerk of the circuit court of the county designated to the clerk of the court wherein the accused is to be tried. Thereupon writ of *venire facias* shall be issued by the clerk of the court wherein the accused is to be tried, directed to the sheriff of the county wherein the jurors have been drawn, commanding him to summon the jurors so drawn to attend for jury service in the county wherein the accused is to be tried upon the day named in the writ. Said jurors shall attend for the purpose of the trial of the accused, and the jury shall be selected in the manner provided by law. For their services, the jurors so drawn shall be paid the per diem and mileage out of the same funds that the jurors of the county wherein the accused is to be tried are paid. [Amendment of Legislature of 1915.]

Sec. 31. It shall be unlawful for any person to bring or carry into the state, or from one place to another within the state, even when intended for personal use, liquors exceeding in the aggregate one-half of one gallon in quantity, unless there is plainly printed or written on the side or top of the suit case, trunk or other container, in large display letters, in the English language, the contents of the container or containers, and the quantity and kind of liquors contained therein. If any person shall violate this section, he shall be deemed guilty of a misdemeanor; and the liquors in the possession of any person violating this section may be seized, and shall be conclusive evidence of the unlawful keeping, storing and selling of same by the person having such liquors in his possession; and upon the conviction of such person he shall be subject to the fines and imprisonments as provided for in section three. [Amendment of Legislature of 1915.]

Sec. 32. A justice of the peace shall have concurrent jurisdiction with the circuit court and other courts having criminal jurisdiction in his county for the trial of first offenses arising under this act. The defendant shall be entitled to a trial by jury, if he shall demand the same, upon depositing with the justice the amount as fixed by law for payment for attendance of the jurors. The state shall have the same right as the defendant to peremptorily challenge any two of the jurors selected and returned by the officer under the writ issued by the justice commanding the summoning of the same. Upon conviction of the accused, the justice shall impose the fines and penalties and required bonds as provided by this act for first offenses; and shall thereupon certify to the prosecuting attorney, for filing in his office, a transcript from his docket of the judgment in the case. Such transcript shall be admissible evidence

upon the trial of the accused for any second offense alleged in an indictment found and returned against him. The justice shall also certify to the prosecuting attorney copies of all bonds given by the defendant upon conviction. The state shall have the same right of appeal as the defendant from any judgment of the justice. Whenever the prosecuting attorney of the county shall appear for the state for any prosecution for any offense under this act, there shall be allowed and taxed as part of the costs a fee of ten dollars, to be recovered and collected by the prosecuting attorney in the same manner as like fees are collected in criminal and other courts wherein trials are had upon indictments. The provisions of section twenty of this act shall apply to trials before a justice of the peace. *Provided, however,* that in any prosecution before a justice of the peace, the prosecuting attorney, or the state commissioner of prohibition or any of his deputies, shall have the right, before trial, to elect whether the case shall be tried and judgment entered, or whether the justice shall hold a preliminary hearing to determine whether the accused shall be held to the grand jury; *provided, however,* that should the defendant desire to confess, then neither the prosecuting attorney, nor the state commissioner of prohibition or any of his deputies, shall have such right to elect, and the justice shall enter judgment upon the confession. [Amendment of Legislature of 1915.]

Sec. 33. Any person called on behalf of the state to testify concerning any violations of this act, who shall give freely and truthfully any testimony tending in any way to incriminate himself, shall be immune from prosecution under this act. [Amendment of Legislature of 1915.]

son violating this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than two hundred dollars, and in addition thereto may be imprisoned not more than three months; provided, however, that druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in sections four and twenty-four."

Passed May 24, 1915, effective August 22, 1915.

Copies of the West Virginia Prohibition Law of February 11, 1913, known as the Yost Law, are bound in pamphlet form in our brief in No. 857. The law was amended in January, 1915, during the pendency of these cases. Copies of the law as so amended were distributed at the argument in pamphlet form entitled "West Virginia Prohibition Law including Amendments made by the Legislature of 1915." Now comes a further amendment adding an additional section (No. 34).

As the purpose of these suits is to compel the defendants to carry interstate shipments of liquor into West Virginia for the personal use of consignees, the form of the decree will depend upon the state of the law of West Virginia at the time the decree is entered. At pages 15-17 of the brief for the State of West Virginia it was contended that the amendment of section 7 in January, 1915, had the effect of rendering moot our claim that section 3 of the law was not intended to

apply to interstate shipments for personal use, and it will doubtless now be contended that interstate shipments of intoxicating liquors for personal use are absolutely prohibited by the amendment of May 24, 1915, and that such prohibition is authorized by the Webb-Kenyon Law.

We submit that the amendment of May 24, 1915, is in contravention of the commerce clause of the Constitution of the United States, as a direct regulation of interstate commerce, beyond the power of the State of West Virginia either under the supposed authority of the Webb-Kenyon Law or otherwise; and also that it is in contravention of the Fourteenth Amendment for the reasons stated in our reply brief.

Respectfully submitted,

Lawrence Maxwell,

Joseph S. Graydon,

Walter C. Capper,

J. Philip Roman,

Counsel for Appellant.

No. [REDACTED] 31875

SUPREME COURT OF THE UNITED STATES

October Term 1914

THE JAMES CLARK DISTILLING COMPANY,
Appellant,

vs.

THE WESTERN MARYLAND RAILWAY COM,
PANY AND THE STATE OF WEST
VIRGINIA.

*Appeal from the District Court of the United States for
the District of Maryland.*

BRIEF FOR THE STATE OF WEST VIRGINIA, APPELLEE.

FRED. O. BLUE,
Counsel for the State
of West Virginia,
Appellee.



No. 857.

SUPREME COURT OF THE UNITED STATES

October Term 1914

THE JAMES CLARK DISTILLING COMPANY,
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THE WESTERN MARYLAND RAILWAY COM-
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*Appeal from the District Court of the United States for
the District of Maryland.*

BRIEF FOR THE STATE OF WEST VIRGINIA, APPELLEE.

This case differs in no material respect from the James Clark Distilling Company, Appellant, *v.* The American Express Company and the State of West Virginia, No. 858, this term. The proceedings in the cases are the same. The assignments of error are the same.

Our answer to the first error assigned by appellant, is this:

Under the laws of West Virginia, in case of a sale in which a shipment or delivery of intoxicating liquors is made by a common or other carrier, the sale of such liquors shall be deemed to be made in the county in said state wherein delivery of such intoxicating liquors is

made to the consignee by such common or other carrier; although the shipment might have been made by a dealer residing out of the state, upon an order received by him to be filled at his place of business, for shipment and delivery by the carrier to the consignee in West Virginia, for the personal use of the consignee.

Our answer to appellant's second assignment of error is this:

(a) The Yost law prohibits any person, resident or non-resident, soliciting within the state orders for intoxicating liquors. This is valid, although such orders may only contemplate a contract resulting from final acceptance in another state. Soliciting of orders is part of the sale. A sale is forbidden in the state. If the sale is forbidden, so is any constituent or accessory part thereof forbidden.

(b) The soliciting of orders for intoxicating liquors can be done by letters, price lists and order blanks, the same as though the dealer solicited in person.

For reasons given in support of the above answers to appellant's assignment of errors set forth in our brief No. 858, we respectfully submit that the decree complained of should be affirmed.

FRED. O. BLUE,
*Counsel for the State of
West Virginia, Appellee.*